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Supreme Court of the United States

[redacted] TERM, 1964

No. 230

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL., APPELLANTS,

vs.

HENRY J. TOOMBS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

FILED JULY 23, 1964

PROBABLE JURISDICTION NOTED OCTOBER 12, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

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BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL., APPELLANTS,

vs.

HENRY J. TOOMBS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN,

vs.

BEN W. FORTSON, JR., as Secretary of State of Ga.; EUGENE CUSHY, Ordinary of Fulton County, Ga.; KATHERINE E. MANN, Ordinary of DeKalb County, Ga.; JAMES F. WHITE, Ordinary of Fayette County, Ga.; A. B. TOLLISON, Ordinary of Forsyth County, Ga.; ROBERT F. ABERCROMBIE, Ordinary of Douglas Cty., Ga.; JIM W. DICKERSON, Ordinary of Cherokee County, Ga.; et al. (party defendants per order of 10-17-62) George Finch, James P. Wesberry, Jr., James H. Gray, George D. Stewart, Neill Leach & Schley Thompson.

Basis of action: Civil Rights Act, 17 Stat. L. 13, 16 Stat. L. 144; U. S. Code, Title 42, Secs. 1983 and 1988.

(Tuttle, Bell & Morgan)

[fol. 2]

DOCKET ENTRIES

DATE		FILINGS—PROCEEDINGS
1962		
Apr.	4	Complaint for temporary and permanent injunction and order allowing same filed, filed.
Apr.	4	Summons issued and delivered to U. S. Marshal.
Apr.	9	Order of the Hon. Elbert P. Tuttle that he and Judge Griffin Bell and Judge Lewis R. Morgan will hear and determine the issues in the action, filed. Copy of order to Judge Morgan, and Judge Bell, and to the Governor of the State of Georgia, and to the Attorney General of the State of Georgia.

DATE	FILINGS—PROCEEDINGS
1962	
Apr. 19	Order of Hon. Elbert P. Tuttle, that the case will be heard on Monday, May 21, 1962 at 9:30 A.M., in the Court of Appeals Courtroom, filed., copies of order to counsel of record, the three Judges, and to the Governor of the State of Georgia and the Attorney General, State of Georgia, per registered mail, return receipt requested; also to all defendants.
Apr. 20	Marshals return on summons & complaint, filed., executed as follows: Ben W. Forston on 4-10-62; Eugene Gunby on 4-5-62; Katherine E. Mann on 4-5-62; James F. White on 4-18-62; A. B. Tollison on 4-6-62; Robert F. Abercrombie on 4-18-62; Jim W. Dickerson on 4-6-62 and Eugene Cook on 4-5-62.
Apr. 23	Consent order to file defensive pleadings extended until 5-4-62, filed. Copies to counsel of record and the Govenor per registered mail, also copies to each defendant and copy to each Judge by the clerk. Notice of setting of above hearing to counsel, Gov. Vandiver, and all named defts.
Apr. 24	ANSWER OF EUGENE GUNBY, filed. Copy to each Judge by Clerk.
May 1	ANSWER OF BALANCE OF DEFENDANTS, filed.
May 3	Motion by plaintiffs for a pre-trial conference, filed. certificate of service, copy for each Judge. SUBMITTED TO EPT.
May 4	ANSWER OF KATHERINE E. MANN, filed.
May 4	All pleadings submitted to Judge Tuttle on Motion by plaintiff for a pre-trial hearing or conference.
May 9	Plaintiff's request for admissions, filed., copies to each Judge by the Clerk.

DATE	FILINGS—PROCEEDINGS
1962	
May 10	By verbal direction of Judge Bell, a pre-trial hearing will be had on Tueaday, May 15, 1962 at 9:30 A.M., at Atlanta, Georgia in Judge Bell's chambers. notice to counsel of record, to the Governor and Attorney General, and to all defendants.
May 14	By direction of GBB above pre-trial not to be had. Points to be covered in briefs rec'd; copies to counsel. Counsel notified by telephone.
May 15	Plaintiff's proposed pre-trial order, received., (Judge Bell will notify when he wants this proposed order).
May 16	Plaintiffs' motion to amend complaint and ORDER allowing same, subject to objections, filed. Copy to counsel of record.
May 16	Trial brief on behalf of plaintiffs, received.
May 17	Response of defendants to requests for admissions, filed. copies to each Judge by the Clerk.
May 18	Memorandum brief on behalf of the defendants, received. SUBMITTED TO each Judge by the Clerk.
May 18	Response of defendant Mann, to request for admissions, filed. copy to each Judge by Clerk.
May 18	Brief on behalf of deft. MANN, received. copy to Judges by Clk.
May 18	Supplemental trial brief on behalf of plaintiffs, received. copies to each Judge by Clerk.
[fol. 3]	
May 21	Came on for hearing, thereupon counsel verbally stipulated to proceed without the presence of Hon. Griffin Bell, Judge Bell being confined in Hospital, but being in contact with the proceedings through an intercom system. The Court thereupon ruled that the cause proceed

DATE 1962	FILINGS—PROCEEDINGS
	on oral testimony rather than affidavits, thereupon Court adjourned until 9:30 A.M., Tuesday, May 22, 1962.
May 22	Came on for hearing as continued from Monday, May 21, 1962, thereupon the evidence having been adduced in full, arguments of counsel were had, thereupon the case was submitted to the Court for their decision. The Court verbally stated that memoranda may be filed by counsel if filed promptly, the decision probably to be rendered this week.
May 23	Stenotype notes of proceedings had 5-21 & 22, 1962, filed.
May 23	Supplemental brief of plaintiffs on adequacy of parties defendant, received. copies to three Judges by Clerk.
May 25	Order postponing any further proceedings in this matter until the State has had a reasonable opportunity to reconstitute the legislature so as to meet the constitutional standards here laid down prior to the January, 1963, session, if the Legislature does not act, then the Court will take whatever action deemed necessary and reasible to accord plaintiff their rights, and the Court retains jurisdiction in this matter, filed., copies delivered personally to MR. SHACKELFORD, MR. LOKEY, MR ISREAL KATZ, MR. WHITE AND MR. B. D. MURPHY AND MR. DILLARD, copies mailed to balance of counsel for plaintiff and defendants.
May 25	Supplemental brief of defendants on parties defendant, received. copies to each Judge the the Clerk.
July 10	Motion of plaintiff for the appointment of special master etc., filed,, copies to three Judges by clerk.

DATE	FILINGS—PROCEEDINGS
1962	
July 10	Transcript of record, filed.
July 10	Brief in support of plaintiff's motion for the appointment of special master, etc., received., copies to the Judges by the Clerk.
July 11	Order that a hearing will be had on motion of plaintiff on Friday, July 13, 1962 at 10:00 A.M., filed. notice to counsel for plaintiff and defendants by telephone, copies mailed to all counsel of record. Calendar clerk notified.
July 13	Hearing had on plaintiff's motion for the appointment of a Special Master and other relief, thereupon the Court stated it would enter an order denying the motion, and that no Special Master would be appointed. The Court stated there would be no necessity in the defendant filing a response to the motion.
July 13	Order denying motion of plaintiffs for the appointment of a Special Master and the motion of the plaintiffs for a ruling as to the adequacy of the parties defendant is not now passed upon, the court retains jurisdiction of the cause for further rulings, filed. Copies to counsel.
July 13	Stenotype notes of proceedings had 7-13-62, filed.
July 17	Transcript of excerpts of remarks by Judge Tuttle at three-judge hearing had July 13, 1962, filed.
July 18	Memorandum opinion filed by Judge Bell and Judge Morgan, filed., copies to counsel of record.
[fol. 4]	
July 24	Statement of documents submitted, filed., WITH EXHIBITS ATTACHED, SUBMITTED TO EPT.
Aug. 22	Motion of defendant KATHERINE E. MANN, filed., with exhibits attached. copies to each Judge by the Clerk.

DATE	FILINGS—PROCEEDINGS
1962	
Aug. 22	Order of the three-judge panel that a hearing will be had on motion of defendant Katherine E. Mann at 2:00 O'clock on Monday, August 27, 1962 and any other person other than parties to the litigation wishing to be heard shall so notify the Clerk of the District Court prior to 10 o'clock A.M., August 27, 1962, filed., copies to counsel of record by the Clerk, copies for each Judge.
Aug. 23	By verbal direction of Judges Tuttle, Bell and Morgan, the case has been reassigned for hearing on motion of defendant Mann to Tuesday, August 28, 1962 at 2:00 P.M., counsel notified.
Aug. 23	Notice of Mr. H. McKINLEY CONWAY, JR., that he wishes to be heard both orally and on submission of briefs at the hearing set for Tuesday, August 28, 1962, filed. copies for each Judge.
Aug. 27	Notice of Mr. J. Ebb Duncan that he wishes to appear at the hearing on Tuesday, August 28, 1962 at 2:00 P.M., filed.
Aug. 27	Notice of Mr. Robert L. Fine that he wishes to appear and be heard before the Court on August 28, 1962, filed.
Aug. 27	Notice of Mr. Guy W. Rutland, Jr., that he wishes to appear and be heard at the hearing set for August 28, 1962, filed.
Aug. 27	Notice that Mr. James W. Paris, Barrow County, is to be heard at the hearing on August 28, 1962, filed.
Aug. 27	Resolution of Mr. James W. Paris, filed., copies to each Judge.
Aug. 27	Memorandum submitted by plaintiffs Re: Alabama reapportionment decision, received., SUBMITTED TO THE THREE JUDGES.

DATE	FILINGS—PROCEEDINGS
1962	
Aug. 28	Came on for hearing on motion of Katherine E. Mann, Ordinary of DeKalb County, Georgia for clarification and direction, etc., the Court thereupon announced they would be act promptly on the motion and make their decision as quickly as possible.
Sept. 5	ORDER on motion for clarification, filed (see order in file); copy to counsel of record.
Oct. 3	ORDER reseting originally scheduled hearing of Oct. 5, 1962, reset for Saturday, Oct. 13, 1962 at 10:00 a.m., filed. Copies to counsel.
Oct. 8	Motion of FRANKLIN ANDERSON TO intervene and ORDER allowing same filed., filed., Notice to counsel of record—copy to each Judge by the Clerk.
Oct. 9	Letter from Judge Tuttle setting the motion to intervene by Mr. Anderson for hearing on Saturday, October 13, 1962 at 10:00 A.M., notice to counsel of record, the Governor, Attorney General, and Calendar noted.
Oct. 9	Motion of defendant Katherine E. Mann to dismiss, filed., copies to each Judge by the Clerk.
Oct. 10	Amendment of Franklin Anderson to his motion to invertene, filed., and ORDER allowing same, filed. copies to each Judge by Clerk.
Oct. 11	Motion for reconsideration by plaintiff, filed., briefs received., copy to each Judge by the Clerk.
Oct. 12	Petition of ROY CHARLES BELL to intervene, filed; intervenor serving all counsel of record —certificate of service to follow. Copy of petition to each Judge.
[fol. 5]	
Oct. 13	Came on for hearing on motion for clarification, and hearing on motion for reconsideration by

DATE 1962	FILINGS—PROCEEDINGS
	plaintiff and defendants amendment to aswer this day filed, motion of Mrs. Mann to dismiss and motion of Franklin Anderson to intervene and also motion of Roy Charles Bell to intervene.
	Amendment to answer of defendant, other than Mrs. Mann and Order allowing same, filed., filed., Hearing concluded, the Court stated an order would be entered denying intervenors motions for injunctive relief by Tueaday, October 16, 1962, but verbally allowed the motion to intervene filed, rulings were witheld on all other matters before the Court. Parties were directed to file briefs within five days, the Court then to undertake to rule on whether relief should be granted by time of General Election.
Oct. 16	Motion of defendants, other than Mrs. Mann, to stay all proceedings now pending in Fulton County Superior Court, that a rule ni si issue, and that pending hearing thereon George G. Finch and James P. Westberry, Jr., be enjoined from enforcing the aforesaid order of Fulton Superior Court, filed., exhibits attached.
Oct. 16	Order that George G. Finch and James P. Wesberry, Jr., and James P. Gray, George D. Stewart, Neill Leach and Schley Thompson show cause before this Court on the 18th day of October, 1962 at 9:00 A.M., as to why said respondnets should not be made party defendant and all proceedings in the cause entitled Finch and Wesberry -vs- Gray, et al, No. A96441, now pending in Fulton Superior Court, and that all proceedings in fulton Superior Court above referred to are hereby stayed to the extent that respondents herein, to wit: James P. Gray, George D. Stewart Neill Leach and Schley Thompson shall conduct the October 16th senatorial primary in Fulton County

DATE 1962	FILINGS—PROCEEDINGS
	in such manner as will: (1) permit all voters in fulton county to vote on all senatorial district seats therein and (2) to mark on each ballot the senatorial district in which the voter casting such ballot resides, this stay shall expire at 11:00 O'clock A.M., October 18, 1962, filed. Copy of Order and motion (2 copies) to the Marshal for service on General Finch and on James P. Wesberry, Jr., Mr. Leverett acknowledged service as to James P. Gray, George D. Stewart, Neill Leach and Schley Thompson. Notice as to the hearing mailed to all parties concerned.
Oct. 17	Order that George G. Finch, James P. Wesberry, Jr., James H. Gray, George D. Stewart, Neill Leach and Schley Thompson have indicated personally or through counsel that they have no objections to being made a party defendant, and that they are hereby made a party defendant and that the show cause hearing scheduled for Thursday, October 18, 1962 at 9:00 A.M. is vacated, filed., copies to counsel of record, respondents.
Oct. 18	Memorandum brief on behalf of defendants in opposition to motion for intervention, received., COPIES TO EACH JUDGE.
Oct. 18	Amendment to intervention of FRANKLIN ANDERSON and order of Judge Tuttle allowing same filed., filed. copies to each Judge.
Oct. 18	Memorandum brief of ANDERSON on motion to intervene, received. copies to each Judge.
Oct. 18	Motion of Dr. R. C. Bell to intervene, filed., copy to each Judge.

[fol. 6]

DATE	FILINGS—PROCEEDINGS
1962	
Oct. 18	Brief of Dr. Roy C. Bell, received., copy to each Judge.
Oct. 19	Order that the Court does not rule on the validity of the provisions of Section 9 of the Senate Bill No 1, and that this Court is of the opinion that the elective process of the state should not be enjoined at this late date, and, in the exercise of its equity powers, will not restrain and enjoin the election of Senators in the General Election conducted under the provisions of Senate Bill 1 in multi-district counties as sought, and make no ruling as to which system is to be given effect, and that the motions to intervene ar denied, , and that the Court retains jurisdiction of the matter until such time as the Georgia Senate is reconstituted according to the previous orders of this Court, and the motion of Mrs. Mann to dismiss is denied, filed., copies to counsel of record.
Oct. 23	Motion of ROY C. BELL for reconsideration of motion to intervene, filed; copy to each Judge.
Oct. 18	Motion to allow the appearance of counsel on behalf of Roy C. Bell, filed.
Oct. 24	Order allowing the appearance of counsel on behalf of Roy C. Bell, filed., copy to counsel for Mr. Bell.
Oct. 26	Marshal's return on service of motion for stay of State Court proceedings and to add parties defendant and order executed Oct. 16 as to James Pl Wesberry, Jr. and George G. Finch, filed.
Oct. 31	Order denying motion of Dr. Bell to reconsider his motion to intervene, filed., copies to counsel of record and all parties concerned.

DATE	FILINGS—PROCEEDINGS
1963	
July 3	By direction of Judge Tuttle, letter to counsel requesting they advise if any issues remain in case or if in order to close.
July 12	Reply letter to above from Frank Shackelford urging the case be kept open pending the decision of the U.S. Supreme Court re apportionment by 2nd House of a State Legislature. Letter to Judge Tuttle with copy of aforementioned letter attached.
July 15	Letter from Judge Tuttle to leave case pending until the outcome of the cases pending before the Supreme Court mentioned in Mr. Shackelford's letter.
July 15	Letter from Mr. Murphy, copy of which along with letter mailed to Judge Tuttle.
1964	
Jun. 17	Plaintiffs' motion for further consideration and additional relief, with brief, filed. Copy to Judges Tuttle, Bell and Morgan by Clerk.
June 17	Set for hearing on above for Friday, June 19th, at 9:30 A.M. in Court of Appeals Courtroom, Atlanta, Ga. Notice to counsel, by telephone and mail.
June 18	Motion of Carl E. Sanders, Governor of Georgia, to appear as amicus curaie—filed.
June 19	Motion of MAURICE N. MALOOF and LAMAR W. SIZEMORE to be relieved of responsibility and to have their names stricken as counsel, and order of Hon. Elbert P. Tuttle, U. S. Circuit Judge, granting motion, filed. Motion for immediate order of "Weighted Voting" System for the Georgia House of Representatives, by JAMES P. WESBERRY, JR., deft., filed. (No brief) Copy to 3 judges.

[fol. 7]

DATE	FILINGS—PROCEEDINGS
1964	
June 19	Hearing had on pltfs.' motion for further consideration and additional relief. ORDER granting motion of CARL E. SANDERS, Gov. of Ga., to appear as amicus curiae—filed. Case submitted to 3 judge court.
	Order outlining proposed order; directing defts. to show cause on 6-24-64 at 2:00 P.M., why same should not be entered, filed.
June 23	Motion to intervene or in alternative to appear as amicus curiae, by FRANK S. TWITTY, et al (numerous parties, see motion), with brief, filed. Copy to 3 judges.
June 24	Amicus curiae motion by CITY OF ATLANTA to modify order of 6-19-64, with ORDER allowing same filed—filed. (Notice to parties by counsel Slaton). Copy to 3 judges.
	Pltfs.' supplement to complaint, with ORDER allowing same filed, subject to objection—filed. (Pltfs.' counsel serving copies on defense counsel). Copy to 3 judges.
	Defts.' response to show cause order of Court dated 6-19-64, on behalf of defts. OTHER THAN GUNBY and MANN—filed. Copy to 3 judges.
	Hearing had pursuant to show cause order of 6-19-64. Counsel for parties to file stipulations.
	Cause submitted to Court.
	Order filed that (1) Art. III, Sec. III, Paragraph I (Code Sec. 2-1501) of Constitution of Ga. of 1945, and Sec. 47-101 of Code of Ga., as amended, are null, void and inoperative; (2) defts. are enjoined from placing on ballot to be used in Gen. Elec. to be held 11-3-64, or subsequent elec. until Gen. Assembly is reappor-

DATE 1964 FILINGS—PROCEEDINGS

tioned, question re new constitution, with certain provisions, etc.; (3) pltfs.' motion for further injunctive relief is denied at this time, with certain provisions, etc.; Court retaining jurisdiction for such other and further orders as may be necessary. (Copy furnished to all counsel).

June 26 Motion of pltfs. to modify order of June 24, 1964, filed. (Taken to Judge Bell by Atty. White for entry of order, with 3 copies for judges)

June 29 Stipulation of parties—filed. Copy to 3 judges.

June 30 Revised order on order of June 24, 1964—filed. (See order) Motion for stay pending appeal by defts. FORTSON, WHITE, TOLLISON, ABERCROMBIE, DICKERSON, of order of 6-24-64, as amended 6-30-64—filed.

ORDER DENYING ABOVE MOTION—filed. Notice of above 2 orders to counsel.

July 1 Affidavit of ISRAEL KATZ—filed. Copy to 3 judges.

Notice of appeal to the Supreme Court by defts. Ben W. Fortson, Jr., James F. White, A. B. Tollison, Robert F. Abercrombie, and Jim W. Dickerson—filed. (appeal from order of 6-24-64 and revised order of 6-30-64). DESIGNATION OF RECORD and QUESTIONS PRESENTED, also filed along with notice of appeal. Copy to pltfs.' counsel, Mr. Shackelford. (No appeal bond necessary—B(GN)

July 2 Court Reporter's steno notes of proceedings on June 19, & 24, 1964, filed.

[fol. 8]

July 6 Brief for the appellees in opposition to motion for stay pending appeal—filed.

DATE	FILINGS—PROCEEDINGS
1964	
July 8	Transcript of proceedings of June 19, 1964, filed.
July 10	Appellant's additional designation, filed.
July 13	Stipulation as to designation of record on appeal, filed.

Clerk's Certificate to foregoing paper (omitted in printing).

[Vol. 9] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 7883

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN, Plaintiffs,

—vs.—

BEN W. FORTSON, JR., as Secretary of State of Georgia; EUGENE GUNBY, Ordinary of Fulton County, Georgia, KATHERINE E. MANN, Ordinary of DeKalb County, Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia, A. B. TOLLISON, Ordinary of Forsyth County, Georgia, ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia, JIM W. DICKERSON, Ordinary of Cherokee County, Georgia, et al.

COMPLAINT—Filed April 4, 1962

Henry J. Toombs, Mrs. George Taylor Douglas, Gordon G. Johnson, and John L. Glenn, Plaintiffs above named, respectfully represent as follows:

I.

That this Court has original jurisdiction of this action, and that the Plaintiffs have the right to bring this suit under the Civil Rights Act, 17 Stat. L. 13, 16 Stat. L. 144; U. S. Code, Title 42, Secs. 1983 and 1988, as follows:

"Section 1983. Civil Action for Deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within

the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress." (R.S. Sec. 1979)

[fol. 10] "Section 1988. Proceedings in vindication of Civil Rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, • • • (R. S. Sec. 722)

Additionally, this Court has jurisdiction under 62 Stat. L. 1932, 28 U. S. C. Section 1343 (3). This section reads as follows:

"Section 1343. Civil rights.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person; . . .

• • • • • • •

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

II.

This is a proper case for determination by a bench composed of three judges, as provided in 28 U. S. Code 2281 et seq., 62 Stat. L. 968, inasmuch as it seeks interlocutory and permanent injunction to restrain the enforcement, operation and execution of statutes and constitutional provisions of the State of Georgia, restraining officers thereof including the Secretary of State, from complying with the

provisions of such Statutes and Constitutional provisions. This action is also a civil case brought under Sec. 28, U. S. Code 2201 and 28 U. S. Code 2202, seeking relief by declaratory judgment.

[fol. 11] III.

That the Plaintiffs are citizens of the United States and of the State of Georgia, and as qualified voters in said State are entitled to vote for members of the Legislature of the State of Georgia. In particular: Plaintiff, Gordon Johnson, is a registered voter and resident of DeKalb County, Georgia; Plaintiff, John L. Glenn, is a registered voter and resident of DeKalb County, Georgia; Plaintiff, Mrs. George Taylor Douglas, is a registered voter and resident of Fulton County, Georgia; Henry J. Toombs, Plaintiff, is a registered voter and resident of Fulton County, Georgia.

That the above named Plaintiffs jointly and severally bring this action on their own behalf and on behalf of all other voters in this State of Georgia.

IV.

That the Defendants are all citizens of the United States and of the State of Georgia and reside within the said State. In particular:

Defendant, Ben W. Fortson, Jr., is the duly elected qualified and acting Secretary of State of the State of Georgia, with his office in Atlanta, Georgia, in said State, as such he is charged with the duty of furnishing each Ordinary of the State the form of the official ballot, all blank forms, including tally sheets, lists of voters, forms of returns, certificates and directions to be used in elections for members of the General Assembly, by virtue of the applicable provisions of the Georgia Code, 40-601, Paragraph 7, [fol. 12]. (Acts 1873, page 26; Acts 1946, page 75). He is further charged with the duty of receiving from the manager designated to consolidate the vote of each county, their certificates showing the whole number of votes each candidate received in the county for the office of member of the General Assembly of Georgia, as provided by Code

Sec. 34-1303, Paragraph 9 (Acts 1921, page 91; 1945, pages 129, 135); among his duties, he certifies the results of elections of members of the General Assembly of Georgia; defendants; Eugene Gunby, Katherine E. Mann, James F. White, A. B. Tollison, Robert F. Abercrombie and Jim W. Dickerson, in the order named are respectively in the order named, Ordinaries of Fulton, DeKalb, Fayette, Forsyth, Douglas and Cherokee Counties, Georgia, and each is respectively a resident of the County of which he or she is Ordinary and each of said Ordinaries are respectively the principal official of their respeotive county charged with the duties and functions of conducting elections for member(s) of the General Assembly of Georgia, in such respective County. Each of said Ordinaries and the remaining Ordinaries of the other 153 counties of Georgia normally and usually act as one of the election managers in each respective county, with respect to conducting the elections for membership in the General Assembly of Georgia. This action is brought against the aforenamed defendants in their representative capacities, said Ordinaries are sued also as representatives of all the county Ordinaries in the [fol. 13] State of Georgia, the persons being so numerous as to make it impracticable to bring them all before the Court; but there is a common question of law involved, namely, the constitutionality of Article III, Section II and Section III of the Constitution of Georgia of 1945, and the constitutionality of Georgia Laws set forth in Georgia Code 47-101, (Acts 1961, page 111) and Code Section 47-102.1 (1946, pages 42, 44; 1950, page 165); that common relief is sought against all said Ordinaries and election managers in their official capacities. It being the duties of the said Ordinaries and election managers, to hold elections for members of the General Assembly, certify the results of elections held in the respective counties to the Secretary of State, and consolidate the vote in respective counties, taking the other usual steps to prepare for and hold elections in respective counties of the State of Georgia for members of the General Assembly by virtue of Code Secs. 34-1201 et seq. (Acts 1880-1, page 151), Chapter 34, Sec. 13, et seq.

V.

Plaintiffs are now denied the right to equal suffrage in free and equal elections, and equal protection of the laws, as guaranteed under the Fourteenth Amendment to the Constitution of the United States, they bring this action on their own behalf and on the behalf of all qualified voters of their respective counties of the State, and further on behalf of all voters of the State of Georgia who are similarly situated for a declaration of their rights and a declaration of the invalidity of the mentioned constitutional sections of the State of Georgia, and public acts or statutes which apportion the representatives and senators of the General Assembly of Georgia among the respective coun-
[fol. 14] ties of the State of Georgia, the aforesaid under Sec. 28, U. S. Code 2201 and Sec. 28, U. S. Code 2202, and for such injunctive relief as may be proper to assure them and all other voters in the State of Georgia free and equal franchise and equal protection of the laws which are now and have been for many years denied them by the Defendants and their predecessors in office who have complied with the aforesaid constitutional sections of the Georgia Constitution, and the aforesaid statutes of the State of Georgia which have been heretofore set out above.

VI.

That Article 14, Sec. 1 of the U. S. Constitution provides in part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Under this provision of the Constitution of the United States, citizens having the right to vote in State elections are entitled to equal protection of that right, and the adoption and enforcement by any state of a scheme of apportionment of elected representatives whereby the representation

accorded to voters in one area is arbitrarily, substantially, and persistently less than that accorded to voters in other areas is a denial of equal protection of that right. As hereinafter shown, the Georgia constitutional and statutory provisions herein attacked comprise a scheme of apportionment of elected representatives whereby the representation accorded to plaintiffs and other voters in this area has been and is arbitrarily, substantially, and persistently less than that accorded to voters in other areas.

VII.

There has been no constitutional convention assembled in Georgia since 1877 and there is no provision in the Georgia Constitution or laws for assembling a constitutional convention of people in the State of Georgia, without two-thirds of the members of each House of the General As-[fol. 15] sembly first having voted in favor of assembling such a constitutional convention. That as will hereinafter be further explained, the overwhelming majority of the people of Georgia, possess far insufficient representation in each House of the General Assembly to ever obtain a vote of two-thirds of the members of each of said Houses of the General Assembly, in favor of assembling such constitutional convention.

VIII.

The Georgia Constitution of 1945 is in essence a misnomer, so far as apportionment of the General Assembly of Georgia is concerned, for the reason that the malapportionment of the General Assembly therein provided, merely continued in effect essentially the same malapportionment formula that was contained in the prior Constitution of 1877, and the "Constitution of 1945" was submitted to the people as one constitutional amendment, not by constitutional convention, so that the people were left with the alternative of having exactly the same malapportionment formula, whether the amendment was adopted or rejected, with the additional disadvantage of foregoing constitutional reforms in other areas, that would accrue from the adoption of the "Constitution of 1945". The Georgia Legislature

(General Assembly of Georgia) has consistently failed and refused to permit the people of Georgia to assemble in constitutional convention, for the very purpose of frustrating any rectification of the malapportionment of the General Assembly complained of in this Civil Action.

IX.

The Constitution and laws of Georgia do not provide for initiative or referendum procedures and the people of Georgia have no recourse whatever to alleviate the condition of malapportionment of the General Assembly of the State of Georgia, which is hereinafter more fully explained.

[fol. 16]

X.

In addition to the foregoing disabilities, Georgia Law provides that all political party primaries in Georgia are required to be held under a County Unit System, whereunder the voters of each county, irrespective of the population of that county, have a County Unit vote which is exactly twice the number of representatives allotted to such county in the Lower House of the General Assembly under Article III, Section II, Paragraph I of the "Constitution of 1945", thereby reducing the political voting power of citizens in populous counties and causing them to have insufficient influence in the executive branch of Government to generate any effort from that source to help alleviate the malapportionment of the Georgia Legislature. Nominations in the Democratic primary have been tantamount to election in the State of Georgia, since 1870. In any event the executive branch alone could not force meaningful reapportionment.

XI.

In spite of the glaring inequities of representation in the General Assembly, which will be hereinafter more further detailed, Georgia's state senate in 1961, defeated a resolution even to create a study committee to look into the problem. The "overwhelming majority of votes" in the Georgia Senate which defeated this resolution came

from Senators representing less constituents than the defeated minority.

[fol. 17]

XII.

At the 1962 General Session of the Legislature, in spite of a background of widespread entreaty for reform and alleviation of the malapportionment of the General Assembly, the Lower House defeated by a vote of 107 to 44, an extremely modest reapportionment reform, which would not have corrected the inequities in the Lower House whatsoever, and which would have sanctioned inequities between districts in the State Senate, provided not to exceed fifty (50%) per cent inequity as between senatorial districts. The small minority of representatives in number voting for such reapportionment reform represented more than a majority of the citizens of Georgia, whereas the "overwhelming majority of 107 representatives" voting against the reform represented far less than a majority of the citizens of Georgia.

XIII.

Under the present apportionment of the General Assembly of Georgia herein complained of, representatives from 103 counties having approximately twenty two and one-half (22½%) per cent of the population of Georgia have a majority of votes in the House and State Senators from 28 senatorial districts containing twenty one and four-tenths (21.4%) per cent of the people of Georgia legislation have a majority of votes in the Senate, and legislation can be enacted by these small minorities against the wishes of the majority of Georgia citizens, and this is true of laws dealing with taxation, appropriations and alloca-

[fol. 18]

tions of funds, and all fundamental matters affecting a free citizenry.

XIV.

Between 1877 when the constitutional formulas hereinafter complained of were placed in the Georgia Constitution and until 1920, an overwhelming majority of the people

of Georgia lived in rural areas, and the apportionment of the General Assembly provided by such formulas was possibly not so irrational as to deny the residents of populous counties equal protection of the laws with respect to representation in the General Assembly. Since 1920, however, severe population shifts in the counties of Georgia has resulted in a situation wherein the representation fixed by the complained of formulae, has in ever increasing degree during said 42 years, denied the citizens in the more populous counties, equal protection of the laws with respect to representation in the General Assembly of Georgia. As of the 1960 census, approximately forty one (41%) per cent of the population of Georgia residing in the eight most populous counties had only eleven and seven-tenths (11.7%) per cent of the representation in the Lower House. With respect to the State senate of Georgia under the 1960 census, citizens residing in twelve of the fifty four senatorial districts, which twelve districts comprise fifty five and eight-tenths (55.8%) per cent of the population of Georgia possessed only twenty two and two-tenths (22.2%) per cent of the representation in the State senate.

[fol. 19] XV.

The applicable constitutional provisions of the Constitution of Georgia with respect to the legislative department are as follows:

a) Power Vested in General Assembly, Article III, Section I, Paragraph I.

"The legislative power of the State shall be vested in a General Assembly which shall consist of a Senate and House of Representatives."

b) Senatorial Districts, Article III, Section II, Paragraph I.

"The Senate shall consist of not more than fifty four members and there shall be not more than fifty four senatorial districts with one senator from each district as now constituted, or as hereafter created. The various senatorial districts shall be comprised of the coun-

ties as now provided, and the General Assembly shall have authority to create, rearrange and change the districts within the limitations herein stated."

c) COUNTY REPRESENTATION, Article III, Section III, Paragraph I.

"*Number of Representatives*—The House of Representatives shall consist of representatives apportioned among the several counties of the State as follows: To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each."

d) Article III, Section III, Paragraph II.

"*Apportionment changed, how*—The above apportionment shall be changed by the General Assembly at its first session after each census taken by the United States Government in accordance with the provisions of Paragraph I of Section III of this Article."

[fol. 20] XVI.

With respect to Article III, Section I, Paragraph I of the Constitution of Georgia, above quoted, Plaintiffs aver that said constitutional provision is valid and subsisting, and does not violate Plaintiffs' rights.

XVII.

With respect to Article III, Section II, Paragraph I above, Plaintiffs aver that provision for fifty four senatorial districts therein contained, as such, does not violate Plaintiffs' rights, but that the apportionment of fifty four districts therein provided for, as made by the General Assembly in 1946 (Code Section 47-102) is irrational, arbitrary and capricious, and results in denial to Plaintiffs of the equal protection of the laws. Likewise, failure of the General Assembly to apportion said fifty four senatorial districts in a reasonable and rational manner since 1946 re-

sults in the deprivation of Plaintiffs' Civil and Legal rights, and denies them equal protection of the laws. There is attached to this Petition as Exhibit "A" thereto and made a part hereof by reference a schedule showing the district population of each of the fifty four senatorial districts as of the 1960 Federal Census, pursuant to the apportionment of said districts, continued in effect without change by the General Assembly since 1946.

XVIII.

There is attached to this Petition as Exhibit "B" thereto and made a part hereof by reference, Code Section 47-102 verbatim, showing the 159 counties of Georgia, and the manner in which they have been apportioned into the vari- [fol. 21] ous numbered senatorial districts referred to in said Code Section 47-102, and corresponding to the same number in said Exhibit "A".

XIX.

As is shown in said Exhibit "A", said fifty four senatorial districts extend in population size from 13,050 in the twelfth to 556,326 in the fifty second, and possess various arbitrary and capricious population classifications of all types in between the two extremes.

XX.

In addition to the gross inequities contained in the apportionment of the senatorial districts as shown by Exhibit "A" attached hereto, Georgia law provides that the Senators in said malapportioned districts shall be furnished by the counties comprising such respective district under a rotation plan irrespective of severe population disparities among counties within a particular district (said law being Code Section 47-102.1 and reading as follows):

> "*Senators to be furnished by counties in rotation*—The first county named in each of the above districts shall furnish the senator for the 1946 general election and after that the counties in order named above shall furnish the senator for that district: Provided, however,

that in all senatorial districts comprised of two counties, the county having a population according to the census of 1940 or any future census of more than double the population of the other county in said district shall furnish the senator for two successive terms at the expiration of which the smaller county shall furnish the senator for one term. The county having the population of more than double that of the other county as aforesaid shall furnish the senator for the general election of 1950. In the general election of 1952 the smaller county shall furnish the senator and in the general election of 1954 and 1956 the county having the larger population as aforesaid shall furnish the senator and said order of furnishing the senator from such district shall continue in the manner aforesaid. (Acts 1946, pp. 42, 44; 1950, p. 165.)

[fol. 22] This system refers to the districts and counties therein, as shown in Code Section 47-102 (see Exhibit "B" attached).

XXI.

As shown in the right hand columns of Exhibit "A" (Page 4 thereof) attached, only Fulton, Cobb and Dougherty counties from among the eight most populous counties in Georgia are "entitled" to have the senator for their district for the forthcoming 1963 term of the General Assembly, and the counties of Chatham, Richmond, Muscogee, Bibb and DeKalb, all of whom have populations in excess of 100,000 each have no senatorial representation whatsoever save as the same may be furnished by the Senator from the less populous county in their respective senatorial districts, "entitled" to the Senator under said rotation system, (Code Section 47-102.1) above referred to. This situation is exacerbated by the fact that Georgia laws hereinafter more particularly set out require that political party primaries for nominating a senator for his respective district, be held only in the County whose "turn" it is to furnish the Senator under the aforesaid rotation system, and the citizens and registered voters of other counties in

said district (except for senatorial district no. 52) are not allowed to participate by virtue of said laws hereinafter referred to, whatsoever in the nomination of a senator for their respective senatorial district. (Code Sections 34-3219 through 34-3222, Acts 1939, pp. 311, 312; set out verbatim in Exhibit "C" hereto attached).

[fol. 23]

XXII.

Under the aforesaid rotation plan, Senators purportedly representing certain of the more populous senatorial districts, but actually coming from one of the less populous counties in said district, in the 1961 Session of the General Assembly of Georgia voted against even studying the malapportionment situation, although their own district as a whole was severely discriminated against in the existing apportionment of senatorial districts.

XXIII.

Plaintiffs aver that they and voters in the counties where Plaintiffs are domiciled and voters in other counties of Georgia are denied equal protection of the laws by virtue of the existing inequitable senatorial district apportionment (Code Section 47-102).

XXIV.

That by virtue of the rotation system above referred to (Code Section 47-102.1), Petitioners and voters similarly situated are denied the equal protection of the laws.

XXV.

With respect to Article III, Section III, Paragraph I of the Constitution of Georgia, above quoted, setting out the number of representatives for the House of Representatives of the General Assembly, Plaintiffs aver that the total number of such representatives for the 159 counties of Georgia does not necessarily violate the legal rights of Plaintiffs, but that the stated apportionment of said 205 representatives, three to the eight most populous counties, two to the thirty next most populous counties, and one to

each of the remaining counties, creates a formula, which while possibly legal in 1877 is arbitrary, capricious and [fol. 24] irrational, based on population figures of the various counties of Georgia, as reflected in the latest U. S. Census. There is attached to this Petition as Exhibit "D" hereof, a two page exhibit listing the counties and their respective population figures and percentage of total state population as of the 1960 Federal Census.

XXVI.

That the existing apportionment of the State House of Representatives is set out in Code Section 47-101, and reads as follows:

"House of Representatives; membership apportioned—The membership of the House of Representatives shall be as follows: Three members each from the counties of Fulton, DeKalb, Chatham, Muscogee, Bibb, Richmond, Cobb, Dougherty; two members each from the counties of Floyd, Hall, Lowndes, Troup, Clayton, Clarke, Walker, Gwinnett, Whitfield, Glynn, Houston, Carroll, Spalding, Thomas, Ware, Baldwin, Colquitt, Laurens, Coweta, Bartow, Polk, Decatur, Sumter, Bulloch, Upson, Tift, Cherokee, Coffee, Catoosa, Newton; and one member each from each of the other counties of the State. (Acts 1921, p. 229; 1931, p. 48; 1941, p. 348; 1951, pp. 26, 27; 1953, pp. 10, 11; 1961, p. 111.)

XXVII.

Such apportionment, as reflected in the Census figures shown in Exhibit "D" attached is arbitrary, capricious and irrational, and denies to Petitioners the equal protection of the laws.

XXVIII.

That the formula set out in said Article III, Section II, Paragraph I of the Constitution of Georgia should be declared to be unenforceable, as violative of Petitioners' aforesaid constitutional rights, and the General Assembly should be declared to be authorized to reapportion the House of Representatives without reference to such formula.

[fol. 25] XXIX.

With respect to Article III, Section III, Paragraph II, of the Constitution of Georgia, above referred to, Petitioners aver that so much of said Paragraph as requires the General Assembly to reapportion the House of Representatives of the General Assembly after each Census taken by the United States Government is valid and subsisting, and is not violative of the constitutional rights of Petitioners.

XXX.

Petitioners aver, however, that so much of said Article III, Section III, Paragraph II, as requires that such apportionment after each Census be within the confines and limitations of the formula referred to in Article III, Section III, Paragraph I, be declared to be not binding upon the General Assembly of Georgia, and on the contrary be declared to be unenforceable and violative of the constitutional rights of Petitioners to have a rational apportionment of the House of Representatives of the General Assembly, and one which does not deny to them equal protection of the laws.

XXXI.

That this Court require that the General Assembly apportion the House of Representatives of the General Assembly in such manner as will not deny to Petitioners the equal protection of the laws.

[fol. 26] XXXII.

That under the mentioned malapportionment of the General Assembly of Georgia, the value of the vote of Petitioners, and voters in the more populous counties, for representation in the General Assembly of Georgia is far less than the value of the vote for representation in the General Assembly of Georgia by citizens in less populous counties. That the statistics showing the average values of the vote for representation in the General Assembly of Georgia by counties classified according to population, is set out in

Exhibit "E" hereto attached, which Exhibit furnishes the comparable figures for counties in the same category in the State of Tennessee, as well as the national averages.

XXXIII.

The value of a vote for representation in the General Assembly of Georgia, by a voter residing in Fulton County, Georgia, is less than that of a voter residing in any other county in any state in the entire United States.

XXXIV.

That the taxpayers of Fulton County, Georgia provide approximately twenty four and eight tenths (24.8%) per cent of the state's total revenue, and the people of said county number over fourteen (14%) per cent of the total population of Georgia, yet under the complained of malapportionment of the General Assembly of Georgia have only approximately one and four tenths (1.4%) per cent of the representatives in the state House of Representatives.

[fol. 27] XXXV.

The five county area of Fulton, DeKalb, Cobb, Clayton and Gwinnett, which comprises the metropolitan area of the City of Atlanta has approximately twenty five (25%) per cent of the State's population, furnishes approximately one-third of the total state revenue and under the malapportioned condition of the General Assembly of Georgia has only four and three tenths (4.3%) per cent of the representatives in the State House of Representatives.

XXXVI.

The eight most populous counties in the State of Georgia have approximately forty one (41%) per cent of the population of Georgia, furnish more than half of the total state revenue, yet under the malapportionment of the General Assembly of Georgia have only eleven and seven tenths (11.7%) per cent of the representatives in the state House of Representatives.

XXXVII.

The Constitution of Georgia, Article III, Section VII, Paragraph X, provides as follows:

"2-1910 Paragraph X. BILLS FOR REVENUE—All bills for raising revenue, or appropriating money, shall originate in the House of Representatives, but the Senate may propose, or concur in amendments, as in other bills."

XXXVIII.

That the eight most populous counties of Georgia receive back in the dollar value of state services a vastly lesser amount than they furnish in revenue to the State of Georgia.

[fol. 28]

XXXIX.

That the grossly inadequate representation afforded citizens and voters of the said eight most populous counties of Georgia, in the said General Assembly of Georgia, which is the body wherein taxation and appropriations measures originate, affords said voters and citizens residing in said counties little or no effective voice in the determination of how they are taxed and how the tax monies collected from them are appropriated and disbursed.

XL.

That said situation of taxation under the aforesaid discriminatory apportionment of the State House of Representatives, results in the denial to Petitioners and voters similarly situated, and persons residing within said eight most populous counties, of the equal protection of the laws.

XLI.

That this Court has complete jurisdiction to require that the General Assembly of Georgia be apportioned in such a manner as not to deprive Petitioners and those similarly situated from the equal protection of the laws, and to enjoin the defendants, all election managers and all Ordinaries in

the state from holding elections under the existing formulae which violates the said constitutional rights of Petitioners and those voters similarly situated.

[fol. 29]

XLII.

That the defendants or their successors in office, unless prevented by the Court, will perform their duties as they and their predecessors in office have heretofore performed the same under the illegal apportionment acts now of force and effect in Georgia, and the rights of these Plaintiffs and all other qualified voters of Georgia similarly situated can be protected only by decree of this Court declaring the complained of apportionment acts to be unconstitutional, and by enjoining the defendants from holding another unconstitutional election in 1962 or thereafter.

XLIII.

That the next General Election for members of the General Assembly of Georgia is set for the second Tuesday in November, 1962, and that ample time exists for the General Assembly of Georgia to meet in special session and for there to be enacted into law a reapportionment of the General Assembly of Georgia, which complies with the constitutional rights of these plaintiffs and other qualified voters of Georgia similarly situated and which would grant to them the equal protection of the laws.

XLIV.

That it is meet and proper that unless the General Assembly of Georgia reapportion itself in a constitutional manner prior to the election set for the second Tuesday in November, 1962, that this Court decree that the defendants exercise their respective duties and prepare for the election of 1962 and hold the same in such manner that the election [fol. 30] will be held at large over the state as a whole, whereby every qualified voter shall have the right to vote for everyone of the fifty four members of the Senate and everyone of the two hundred and five members of the House of Representatives to be elected to the 1962 General Assembly.

XLV.

That it is meet and proper that this Court mould a decree whereby the constitutional rights of Petitioners to have the General Assembly of Georgia apportioned in a constitutional manner, be protected and carried into effect.

Wherefore, the premises considered, Plaintiffs respectfully pray that this Court take jurisdiction of this matter; that a special three Judge Court be called to hear and determine this cause as by law provided in 62 Stat. L. 968; 28 USC, Section 2281, et seq. and declare the rights of the Plaintiffs pursuant to 68 Stat. L. 890 USC, Section 2201, in the premises, to wit:

a) That this Court hold and decree that the present legislative apportionment of the General Assembly of the State of Georgia has deprived and continues to deprive Plaintiffs of liberty and property without due process of law, and has denied and continues to deny the Plaintiffs equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States;

b) That this Court hold and decree Code Sections 34-3219 through 34-3222, inclusive of the Georgia Code to be void and invalid, as being contrary to the Fourteenth Amendment of the Constitution of the United States and [fol. 31] Article I, Section I, Paragraphs II, III and XXV of the Constitution of the State of Georgia;

c) That this Court hold and decree that Code Sections 47-102 and 47-102.1 of the Georgia Code are void and invalid as being contrary to the Fourteenth Amendment of the Constitution of the United States, and Article I, Section I, Paragraphs II, III and XXV of the Constitution of the State of Georgia;

d) That this Court hold and decree that Code Section 47-101 of the Code of Georgia is void and invalid as being contrary to the Fourteenth Amendment of the Constitution of the United States;

e) That this Court hold and decree that so much of Article III, Section III, Paragraph I of the Constitution of

Georgia as requires that representatives in the State House of Representatives be assigned three to the eight most populous counties, two to the thirty next most populous counties, and one to each of the remaining counties, is void and unenforceable, and violates the Fourteenth Amendment of the Constitution of the United States;

f) That this Court hold and decree that so much of Article III, Section III, Paragraph II of the Constitution of Georgia as requires that apportionment of the House of Representatives of the General Assembly be restricted to the limitations of the formula referred to in Article III, Section III, Paragraph I of the Constitution of Georgia be declared to be not binding upon the General Assembly of Georgia, and on the contrary be declared to be unenforceable and in violation of the Fourteenth Amendment of the Constitution of the United States;

[fol. 32] g) That this Court hold and decree that Plaintiffs and those similarly situated are entitled to vote for members of the General Assembly under a reapportionment of the General Assembly, which does not deny to these Plaintiffs the equal protection of the laws;

And Further, Plaintiffs particularly pray that the Court grant further relief in accordance with 62 Stat. L. 964, 28 USC: Section 2202, as follows:

h) To restrain the defendants and those represented by them as a class and particularly the defendant, Ben W. Fortson, Jr., in his representative capacity as Secretary of the State of Georgia, from furnishing any forms for nominations and/or elections with respect to nominations or elections to the General Assembly of the State of Georgia, and from furnishing any Ordinary or election manager of the State, the form of the official ballot, tally sheets, lists of voters, forms of returns, certificates and directions to be used in elections for members of the General Assembly or receiving from the managers designated to consolidate the vote for any county any certificates showing the number of votes any candidate purportedly received in said county for the office of member of the General Assembly of Georgia, or from certifying the results of any election for the posi-

tion of a member of the General Assembly of Georgia, until [fol. 33] such time as the General Assembly of Georgia is validly reapportioned and in such a manner which does not deprive these Plaintiffs and voters and those voters similarly situated of the equal protection of the laws;

i) In the alternative or upon the failure of proper reapportionment of the General Assembly, to direct the defendants to declare, prepare for and hold the next primary and general elections for members of the General Assembly of the State of Georgia on an at large basis and to direct them to take whatever further action is necessary to insure that all candidates for election to the 1963 Session of the General Assembly of Georgia run at large throughout the State on a popular vote basis; and said method of election to continue until such time as said General Assembly of Georgia enacts legislation and there is enacted into law legislation reapportioning the state senatorial districts and seats in the state House of Representatives in accordance with the aforesaid constitutional rights of the Plaintiffs and others similarly situated;

[fol. 34] j) For such other and further relief as may seem just, equitable and proper.

This is the first application for any extraordinary process in this cause.

Notices and papers required to be served on Plaintiffs in this case may be served on Francis Shackelford, Attorney At Law, C & S Bank Building, Atlanta 3, Georgia.

Attorneys for Plaintiffs: Francis Shackelford, Hamilton Lokey, Joseph B. Cumming, Edward S. White, Israel Katz, Wm. B. Gunter, A. R. Kenyon, Maurice N. Maloof, C. Baxter Jones, Jr., J. Quentin Davidson, Albert P. Reichert, John E. Simpson, Raymond M. Reed, John W. Sognier.

[fol. 35] *Duly sworn to by Mrs. George Taylor Douglas, Gordon G. Johnson, John L. Glenn, and Henry J. Toombs, jurats omitted in printing.*

SENATORIAL DISTRICTS - BY COUNTIES AND POPULATION

DISTRICTS	POPULATION	PERCENT
1. Effingham	10,144	
Chatham	188,299	
	198,443	5.03
2. Liberty	14,487	
McIntosh	6,364	
Bryan	6,226	
	27,077	0.69
3. Wayne	17,921	
Brantley	5,891	
Long	3,874	
	27,686	0.70
4. Charlton	5,313	
Camden	9,975	
Glynn	41,954	
	57,242	1.45
5. Clinch	6,545	
Ware	34,219	
Atkinson	6,188	
	46,952	1.19
6. Lowndes	49,270	
Echols	1,876	
Lanier	5,097	
	56,243	1.43
7. Mitchell	19,652	
Grady	18,015	
Thomas	34,319	
	71,986	1.83
8. Decatur	25,203	
Seminole	6,802	
Miller	6,908	
	38,913	0.99
9. Early	13,151	
Baker	4,543	
Calhoun	7,341	
	25,035	0.63
10. Worth	16,682	
Lee	6,204	
Dougherty	75,680	

DISTRICTS	POPULATION	PERCENT
12. Quitman	2,432	
Stewart	7,371	
Webster	3,247	
	13,050	0.33
13. Macon	13,170	
Schley	3,256	
Sumter	24,652	
	41,078	1.04
14. Dooley	11,474	
Pulaski	8,204	
Bleckley	9,642	
	29,320	0.74
15. Wheeler	5,342	
Montgomery	6,284	
Toombs	16,837	
	28,463	0.72
16. Treutlen	5,874	
Emmanuel	17,815	
Laurens	32,313	
	56,002	1.42
17. Jenkins	9,148	
Screven	14,919	
Burke	20,596	
	44,663	1.13
18. Jefferson	17,468	
Glascock	2,672	
Richmond	135,601	
	155,741	3.95
19. Warren	7,360	
Talliaferro	3,370	
Greene	11,193	
	21,923	0.56
20. Baldwin	34,064	
Hancock	9,979	
Washington	18,903	
	62,946	1.60
21. Wilkinson	9,250	
[illegible]	[illegible]	

[101.30]

	McIntosh	6,304	
	Bryan	6,226	
		27,077	0.69
3.	Wayne	17,921	
	Brantley	5,891	
	Long	3,874	
		27,686	0.70
4.	Charlton	5,313	
	Camden	9,975	
	Glynn	41,954	
		57,242	1.45
5.	Clinch	6,545	
	Ware	34,219	
	Atkinson	6,188	
		46,952	1.19
6.	Lowndes	49,270	
	Echols	1,876	
	Lanier	5,097	
		56,243	1.43
7.	Mitchell	19,652	
	Grady	18,015	
	Thomas	34,319	
		71,966	1.83
8.	Decatur	25,203	
	Seminole	6,802	
	Miller	6,908	
		38,913	0.99
9.	Early	13,151	
	Baker	4,543	
	Calhoun	7,341	
		25,035	0.63
10.	Worth	16,682	
	Lee	6,204	
	Dougherty	75,680	
		98,566	2.50
11.	Clay	4,551	
	Randolph	11,078	
	Terrell	12,742	
		28,371	
13.	Macon	13,170	
	Schley	3,256	
	Sumter	24,652	
		41,078	1.04
14.	Dooley	11,474	
	Pulaski	8,204	
	Bleckley	9,642	
		29,320	0.74
15.	Wheeler	5,342	
	Montgomery	6,284	
	Toombs	16,837	
		28,463	0.72
16.	Treutlen	5,874	
	Emmanuel	17,815	
	Laurens	32,313	
		56,002	1.42
17.	Jenkins	9,148	
	Screven	14,919	
	Burke	20,596	
		44,663	1.13
18.	Jefferson	17,468	
	Glascock	2,672	
	Richmond	135,601	
		155,741	3.95
19.	Warren	7,360	
	Talliaferro	3,370	
	Greene	11,193	
		21,923	0.56
20.	Baldwin	34,064	
	Hancock	9,979	
	Washington	18,903	
		62,946	1.60
21.	Wilkinson	9,250	
	Jones	8,468	
	Johnson	8,048	
		25,766	0.56
22.	Monroe	10,495	
	Lamar	10,240	
	Butts	8,976	
		29,711	0.75

[fol. 36]

DISTRICTS	POPULATION	PERCENT	DISTRICTS	POPULATION	PERCENT
23. Taylor	8,311		35. Newton	20,999	
Crawford	5,816		Walton	20,481	
Beach	13,845		Henry	17,619	
	27,973	0.71		59,099	1.50
24. Chattahoochee	13,011		36. Pike	7,138	
Marion	5,477		Meriwether	19,756	
Muscogee	158,623		Coweta	28,893	
	177,111	4.49		55,787	1.41
25. Upson	23,800		37. Troup	47,189	
Talbot	7,127		Heard	5,333	
Harris	11,167		Carroll	36,451	
	42,094	1.07		88,973	2.26
26. Clayton	46,365		38. Haralson	14,543	
Fayette	8,199		Polk	28,015	
Spalding	35,404		Paulding	13,101	
	89,968	2.28		55,659	1.41
27. Oconee	6,304		39. Douglas	16,741	
Barrow	14,485		Cobb	114,174	
Jackson	18,499		Cherokee	23,001	
	39,288	1.00		153,916	3.90
28. Morgan	10,280		40. Union	6,510	
Putnam	7,798		Towns	4,538	
Jasper	6,135		Rabun	7,456	
	24,213	0.61		18,504	0.47
29. Lincoln	5,906		41. Pickens	8,903	
McDuffie	12,627		Gilmer	8,922	
Columbia	13,423		Fannin	13,620	
	31,958	0.81		31,445	0.80
30. Madison	11,246		42. Floyd	69,130	
Elbert	17,835		Bartow	28,267	
Hart	15,229		Chattooga	19,954	
	44,310	1.12		117,351	2.98
31. Habersham	18,116		43. Gordon	19,228	
Stephens	18,391		Whitfield	42,109	
Franklin	13,274		Murray	10,447	
	49,781	1.26		71,784	1.82
32. Dawson	3,590		44. Dade	8,666	
White	6,935		Catoosa	21,101	
Lumpkin	7,241		Walker	45,264	
	17,766	0.45		75,031	1.90

[fol. 36a]

25. Upson	23,800	
Talbot	7,127	
Harris	11,167	
	42,094	1.07
26. Clayton	46,365	
Fayette	8,199	
Spalding	35,404	
	89,968	2.28
27. Oconee	6,304	
Barrow	14,485	
Jackson	18,499	
	39,288	1.00
28. Morgan	10,280	
Putnam	7,798	
Jasper	6,135	
	24,213	0.61
29. Lincoln	5,906	
McDuffie	12,627	
Columbia	13,423	
	31,956	0.81
30. Madison	11,246	
Elbert	17,835	
Hart	15,229	
	44,310	1.12
31. Habersham	18,116	
Stephens	18,391	
Franklin	13,274	
	49,781	1.26
32. Dawson	3,590	
White	6,935	
Lumpkin	7,241	
	17,766	0.45
33. Forsyth	12,170	
Hall	49,739	
Banks	6,497	
	68,406	1.73
34. DeKalb	256,782	
Gwinnett	43,541	
Rockdale	10,572	
	310,895	7.38

37. Troup	47,189	
Heard	5,333	
Carroll	36,451	
	88,973	2.26
38. Haralson	14,543	
Polk	28,015	
Paulding	13,101	
	55,659	1.41
39. Douglas	16,741	
Cobb	114,174	
Cherokee	23,001	
	153,916	3.90
40. Union	6,510	
Towns	4,538	
Rabun	7,456	
	18,504	0.47
41. Pickens	8,903	
Gilmer	8,922	
Fannin	13,620	
	31,445	0.80
42. Floyd	69,130	
Bartow	28,267	
Chattooga	19,954	
	117,351	2.98
43. Gordon	19,228	
Whitfield	42,109	
Murray	10,447	
	71,784	1.82
44. Dade	8,666	
Catoosa	21,101	
Walker	45,264	
	75,031	1.90
45. Telfair	11,715	
Ben Hill	13,633	
Irwin	9,211	
	34,559	0.88
46. Coffee	21,953	
Bacon	8,359	
Pierce	9,678	
	39,990	1.01

[fol. 37]

DISTRICTS	POPULATION	PERCENT
47. Colquitt	34,048	
Tift	23,487	
Turner	8,439	
	65,974	1.67
48. Crisp	17,768	
Wilcox	7,905	
Dodge	16,483	
	42,156	1.07
49. Evans	6,952	
Candler	6,672	
Bulloch	24,263	
	37,887	0.96
50. Clarke	45,363	
Oglethorpe	7,926	
Wilkes	10,961	
	64,250	1.63
51. Bibb	141,249	
Twiggs	7,935	
Houston	39,154	
	188,338	4.78
52. Fulton	556,326	14.11
53. Brooks	15,292	
Cook	11,822	
Berrien	12,038	
	39,152	0.99
54. Jeff Davis	8,914	
Appling	13,246	
Tattnall	15,837	
	37,997	0.96

ROLL CALL OF SENATE - 1963 UNDER PRESENT ROTATION SYSTEM

Senate District	District Population	County Having Senator under Rotation System	County Population	Ayes	Nays
31st	49,781	Stephens	18,391		
10th	98,566	Dougherty	75,680		
36th	55,787	Meriwether	19,756		
38th	55,659	Harralson	14,543		
52nd	556,326	Fulton	556,326		
7th	71,986	Grady	18,015		
29th	31,956	Lincoln	5,906		
21st	25,766	Jones	8,468		
8th	38,913	Seminole	6,802		
11th	28,371	Terrell	12,742		
6th	56,243	Lowndes	49,270		
9th	25,035	Early	13,151		
14th	29,320	Dooly	11,474		
51st	188,338	Houston	39,154		
47th	65,974	Tift	23,437		
1st	198,443	Effingham	10,144		
44th	75,031	Walker	45,264		
45th	34,559	Ben Hill	13,633		
27th	39,288	Barrow	14,485		
20th	62,946	Hancock	9,979		
53rd	39,152	Berrien	12,038		
42nd	117,351	Chatooga	19,954		
24th	177,111	Chattahoochee	13,011		
46th	39,990	Bacon	8,359		
23rd	27,973	Peach	13,846		
35th	59,099	Henry	17,629		
54th	37,997	Tatnall	15,837		
28th	24,213	Jasper	6,135		
3rd	27,686	Wayne	17,921		
48th	42,356	Dodge	16,483		
40th	18,504	Union	6,510		
43rd	71,784	Gordon	19,228		
12th	13,050	Stewart	7,371		
13th	41,078	Schley	3,256		
34th	310,894	Gwinnett	43,541		
50th	64,250	Clarke	45,363		
17th	44,663	Screven	14,919		
33rd	68,406	Forsyth	12,170		
32nd	17,766	Dawson	3,590		
49th	37,887	Bulloch	24,263		
22nd	29,711	Butts	8,976		
15th	28,463	Wheeler	5,342		
5th	46,952	Atkinson	6,188		
4th	57,242	Glynn	41,954		
18th	155,741	Glascock	2,672		
30th	44,310	Elbert	17,835		
26th	89,968	Clayton	46,365		
37th	88,073	Troup	47,180		

7th	71,986	Grady	18,015
29th	31,956	Lincoln	5,906
21st	25,766	Jones	8,468
8th	38,913	Seminole	6,802
11th	28,371	Terrell	12,742
6th	56,243	Lowndes	49,270
9th	25,035	Early	13,151
14th	29,320	Dooly	11,474
51st	188,338	Houston	39,154
47th	65,974	Tift	23,487
1st	198,443	Effingham	10,144
44th	75,031	Walker	45,264
45th	34,559	Ben Hill	13,633
27th	39,288	Barrow	14,485
20th	62,946	Hancock	9,979
53rd	39,152	Berrien	12,638
42nd	117,351	Chatooga	19,954
24th	177,111	Chattahoochee	13,011
46th	39,990	Bacon	8,359
23rd	27,973	Peach	13,846
35th	59,099	Henry	17,629
54th	37,997	Tatnall	15,837
28th	24,213	Jasper	6,135
3rd	27,686	Wayne	17,921
48th	42,156	Dodge	16,483
40th	18,504	Union	6,510
43rd	71,784	Gordon	19,228
12th	13,050	Stewart	7,371
13th	41,078	Schley	3,256
34th	320,894	Gwinnett	43,541
50th	64,250	Clarke	45,363
17th	44,663	Screven	14,919
33rd	68,406	Forsyth	12,170
32nd	17,766	Dawson	3,590
49th	37,887	Bulloch	24,263
22nd	29,711	Butts	8,976
15th	28,463	Wheeler	5,342
5th	46,952	Atkinson	5,188
4th	57,242	Glynn	41,954
18th	155,741	Glascock	2,672
30th	44,310	Elbert	17,835
26th	89,968	Clayton	46,365
37th	88,973	Troup	47,189
16th	56,002	Treutlen	5,874
19th	21,923	Taliaferro	3,370
2nd	27,077	McIntosh	6,364
41st	31,445	Pickens	8,903
25th	42,094	Upson	23,800
39th	153,916	Cobb	114,174
Mr. President			
	3,943,116		1,627,090

47-102 Senatorial Districts - There shall be 54 senatorial districts of the State of Georgia, and the same shall be distributed and composed of the various counties of said State as follows, to wit:

No. 1	Effingham, Chatham
No. 2	Liberty, Bryan, and McIntosh
No. 3	Long, Brantley, and Wayne
No. 4	Camden, Charlton, and Glynn
No. 5	Clinch, Ware, and Atkinson
No. 6	Lanier, Echols, and Lowndes
No. 7	Mitchell, Thomas, and Grady
No. 8	Miller, Decatur, and Seminole
No. 9	Baker, Calhoun, and Early
No. 10	Worth, Lee, and Dougherty
No. 11	Clay, Randolph, and Terrell
No. 12	Webster, Quitman, and Stewart
No. 13	Sumter, Macon, and Schley
No. 14	Pulaski, Dleckley, and Dooly
No. 15	Toombs, Montgomery, and Wheeler
No. 16	Emanuel, Laurens, and Treutlen
No. 17	Burke, Jenkins, and Screven
No. 18	Jefferson, Richmond, and Glascock
No. 19	Greene, Warren, and Taliaferro
No. 20	Washington, Baldwin, and Hancock
No. 21	Wilkinson, Johnson, and Jones
No. 22	Lamar, Monroe, and Butts
No. 23	Taylor, Crawford, and Peach
No. 24	Marion, Muscogee, and Chattahoochee
No. 25	Talbot, Harris, and Upson
No. 26	Fayette, Spalding, and Clayton
No. 27	Oconee, Jackson, and Barrow
No. 28	Putnam, Morgan, and Jasper
No. 29	McDuffie, Columbia, and Lincoln
No. 30	Hart, Madison, and Elbert
No. 31	Habersham, Franklin and Stephens
No. 32	White, Lumpkin, and Dawson
No. 33	Banks, Hall, and Forsyth
No. 34	Rockdale, DeKalb, and Gwinnett
No. 35	Newton, Walton, and Henry
No. 36	Pike, Coweta, and Meriwether
No. 37	Heard, Carroll, and Troup
No. 38	Polk, Paulding, and Haralson
No. 39	Cherokee, Douglas, and Cobb
No. 40	Rabun, Towns, and Union
No. 41	Fannin, Gilmer, and Pickens
No. 42	Floyd, Bartow, and Chattooga
No. 43	Murray, Whitfield, and Gordon
No. 44	Catoosa, Dade, and Walker
No. 45	Telfair, Irwin, and Ben Hill
No. 46	Coffee, Pierce, and Bacon
No. 47	Turner, Colquitt, and Tift
No. 48	Wilcox, Crisp, and Dodge
No. 49	Candler, Evans, and Bulloch

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EXHIBIT "B" TO COMPLAINT

No. 5	Clinch, Ware, and Atkinson
No. 6	Lanier, Echols, and Lowndes
No. 7	Mitchell, Thomas, and Grady
No. 8	Miller, Decatur, and Seminole
No. 9	Baker, Calhoun, and Early
No. 10	Worth, Lee, and Dougherty
No. 11	Clay, Randolph, and Terrell
No. 12	Webster, Quitman, and Stewart
No. 13	Sumter, Macon, and Schley
No. 14	Pulaski, Bleckley, and Dooly
No. 15	Toombs, Montgomery, and Wheeler
No. 16	Emanuel, Laurens, and Treutlen
No. 17	Burke, Jenkins, and Screven
No. 18	Jefferson, Richmond, and Glascock
No. 19	Greene, Warren, and Taliaferro
No. 20	Washington, Baldwin, and Hancock
No. 21	Wilkinson, Johnson, and Jones
No. 22	Lamar, Monroe, and Butts
No. 23	Taylor, Crawford, and Peach
No. 24	Marion, Muscogee, and Chattahoochee
No. 25	Talbot, Harris, and Upson
No. 26	Fayette, Spalding, and Clayton
No. 27	Oconee, Jackson, and Barrow
No. 28	Putnam, Morgan, and Jasper
No. 29	McDuffie, Columbia, and Lincoln
No. 30	Hart, Madison, and Elbert
No. 31	Habersham, Franklin and Stephens
No. 32	White, Lumpkin, and Dawson
No. 33	Banks, Hall, and Forsyth
No. 34	Rockdale, DeKalb, and Gwinnett
No. 35	Newton, Walton, and Henry
No. 36	Pike, Coweta, and Meriwether
No. 37	Heard, Carroll, and Troup
No. 38	Polk, Paulding, and Haralson
No. 39	Cherokee, Douglas, and Cobb
No. 40	Rabun, Towns, and Union
No. 41	Fannin, Gilmer, and Pickens
No. 42	Floyd, Bartow, and Chattooga
No. 43	Murray, Whitfield, and Gordon
No. 44	Catoosa, Dade, and Walker
No. 45	Telfair, Irwin, and Ben Hill
No. 46	Coffee, Pierce, and Bacon
No. 47	Turner, Colquitt, and Tift
No. 48	Wilcox, Crisp, and Dodge
No. 49	Candler, Evans, and Bullock
No. 50	Wilkes, Oglethorpe, and Clarke
No. 51	Bibb, Twiggs, and Houston
No. 52	Fulton
No. 53	Cook, Brooks, and Berrien
No. 54	Appling, Jeff Davis, and Tattnall

Code Sections 34-3219 through 34-3222, Acts 1939, pp. 311, 312.

34-3219. "State Senate nominations; holding primary in county whose turn it is to furnish nominee - Every political primary election held by any political party, organization or association for the purpose of selecting candidates for the office of State senator from any of the senatorial districts of this State, as provided for by the Constitution, shall be held only in the county whose turn it is to furnish the nominee of such party as a candidate for the office under the rotation system as same was of force prior to January, 1936. (Acts 1939, p. 311)"

34-3220. "Same; primary nominee as sole district nominee - The candidate entitled to said nomination as the result of the primary under the rules and regulations prescribed by the executive committee or other party organization of the county whose turn it is to furnish such nominees under such rotation system shall be the nominee of such party for State Senator from any such district for the ensuing term and no other person shall qualify or have his name placed upon the ballot as the nominee of such party for said office. (Acts 1939, p. 311)"

34-3221. Same; rotation system of nominations departed from only with consent of executive committee. - "Unless the executive committee or other party organization of the county whose turn it is to furnish such nominee shall, by resolution, disclaim the right of the members of such party in such county to furnish such nominee, no county or the members of any such party in any such county shall furnish such party nominee for the office of State Senator at two successive elections for State Senator in said district, or after having furnished such nominee, again do so until every county in such district has furnished the nominee of such party in its turn; provided, that notwithstanding any other provision of this law in every senatorial district composed of counties having equal representation in the House of Representatives that no such county shall furnish the nominee for State senator in said district at two successive elections unless the same is consented to by the executive committees of each of the other counties in said district. (Acts 1939, p. 311)"

34-3222. Same; county from which nominee shall come at next general election - "For the next general election thereafter held for State senator in the various senatorial districts of this State, the nominee of any political party, organization or association as a candidate for such office shall come from the county whose turn it is to furnish such nominee under the rotation system as recognized and inforce in such senatorial district, prior to January 1, 1936. (Acts 1939, pp. 311, 312.)"

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EXHIBIT "C" TO COMPLAINT

POPULATION NUMERICALLY LISTED

Counties	Population	Percent	Counties	Population	Percent
1. Echols	1,876	.05	53. Jones	8,468	.21
2. Quitman	2,423	.06	54. Dade	8,666	.22
3. Glascock	2,672	.07	55. Pickens	8,903	.23
4. Webster	3,247	.08	56. Jeff Davis	8,914	.23
5. Schley	3,256	.08	57. Gilmer	8,922	.23
6. Talieferro	3,370	.09	58. Butts	8,976	.23
7. Dawson	3,590	.09	59. Jenkins	9,148	.23
8. Long	3,874	.10	60. Irwin	9,211	.23
9. Towns	4,538	.12	61. Wilkinson	9,250	.23
10. Baker	4,543	.12	62. Bleckley	9,642	.24
11. Clay	4,551	.12	63. Pierce	9,678	.25
12. Lanier	5,097	.13	64. Camden	9,975	.25
13. Charlton	5,313	.13	65. Hancock	9,979	.25
14. Heard	5,333	.14	66. Effingham	10,144	.26
15. Wheeler	5,342	.14	67. Lamar	10,240	.26
16. Marion	5,477	.14	68. Morgan	10,280	.26
17. Crawford	5,816	.15	69. Murray	10,344	.26
18. Treutlen	5,874	.15	70. Monroe	10,495	.27
19. Brantley	5,891	.15	71. Rockdale	10,572	.27
20. Lincoln	5,906	.15	72. Wilkes	10,961	.28
21. Jasper	6,135	.16	73. Randolph	11,078	.28
22. Atkinson	6,188	.16	74. Harris	11,167	.28
23. Lee	6,204	.16	75. Greene	11,193	.28
24. Bryan	6,226	.16	76. Madison	11,246	.29
25. Montgomery	6,284	.16	77. Dooly	11,474	.29
26. Oconee	6,304	.16	78. Telfair	11,715	.30
27. McIntosh	6,364	.16	79. Cook	11,822	.30
28. Banks	6,497	.16	80. Berrien	12,038	.31
29. Union	6,510	.17	81. Forsyth	12,170	.31
30. Clinch	6,545	.17	82. McDuffie	12,627	.32
31. Candler	6,672	.17	83. Terrell	12,742	.32
32. Seminole	6,802	.17	84. Chattahoochee	13,011	.33
33. Miller	6,908	.18	85. Paulding	13,101	.33
34. White	6,935	.18	86. Early	13,151	.33
35. Evans	6,952	.18	87. Macon	13,170	.33
36. Talbot	7,127	.18	88. Appling	13,246	.34
37. Pike	7,138	.18	89. Franklin	13,274	.34
38. Lumpkin	7,241	.18	90. Columbia	13,423	.34
39. Calhoun	7,341	.19	91. Fannin	13,620	.35
40. Warren	7,360	.19	92. Ben Hill	13,633	.35
41. Stewart	7,371	.19	93. Peach	13,846	.35
42. Rabun	7,456	.19	94. Liberty	14,487	.37
43. Putnam	7,798	.20	95. Haralson	14,543	.37
44. Wilcox	7,905	.20	96. Screven	14,919	.38
45. Oglethorpe	7,926	.20	97. Barrow	14,485	.37

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EXHIBIT "D" TO COMPLAINT

4. Webster	3,247	.08
5. Schley	3,256	.08
6. Talioferro	3,390	.09
7. Dawson	3,590	.09
8. Long	3,874	.10
9. Towns	4,538	.12
10. Baker	4,543	.12
11. Clay	4,551	.12
12. Lanier	5,097	.13
13. Charlton	5,313	.13
14. Heard	5,333	.14
15. Wheeler	5,342	.14
16. Marion	5,477	.14
17. Crawford	5,816	.15
18. Treutlen	5,874	.15
19. Brantley	5,891	.15
20. Lincoln	5,906	.15
21. Jasper	6,135	.16
22. Atkinson	6,188	.16
23. Lee	6,204	.16
24. Bryan	6,226	.16
25. Montgomery	6,284	.16
26. Oconee	6,304	.16
27. McIntosh	6,364	.16
28. Banks	6,497	.16
29. Union	6,510	.17
30. Clinch	6,545	.17
31. Candler	6,672	.17
32. Seminole	6,802	.17
33. Miller	6,908	.18
34. White	6,935	.18
35. Evans	6,952	.18
36. Talbot	7,127	.18
37. Pike	7,138	.18
38. Lumpkin	7,241	.18
39. Calhoun	7,341	.19
40. Warren	7,360	.19
41. Stewart	7,371	.19
42. Rabun	7,456	.19
43. Putnam	7,798	.20
44. Wilcox	7,905	.20
45. Oglethorpe	7,926	.20
46. Twiggs	7,935	.20
47. Johnson	8,048	.20
48. Fayette	8,199	.20
49. Pulaski	8,204	.21
50. Taylor	8,311	.21
51. Bacon	8,359	.21
52. Turner	8,439	.21
53. Jeff Davis	8,914	.23
54. Gilmer	8,922	.23
55. Butts	8,976	.23
56. Jenkins	9,148	.23
57. Irwin	9,211	.23
58. Wilkinson	9,250	.23
59. Bleckley	9,642	.24
60. Pierce	9,678	.25
61. Camden	9,975	.25
62. Hancock	9,979	.25
63. Effingham	10,144	.26
64. Lamar	10,240	.26
65. Morgan	10,280	.26
66. Murray	10,447	.26
67. Monroe	10,495	.27
68. Rockdale	10,572	.27
69. Wilkes	10,961	.28
70. Randolph	11,078	.28
71. Harris	11,167	.28
72. Greene	11,193	.28
73. Madison	11,246	.29
74. Dooly	11,474	.29
75. Telfair	11,715	.30
76. Cook	11,822	.30
77. Berrien	12,038	.31
78. Forsyth	12,170	.31
79. McDuffie	12,627	.32
80. Terrell	12,742	.32
81. Chattahoochee	13,011	.33
82. Paulding	13,101	.33
83. Early	13,151	.33
84. Macon	13,170	.33
85. Appling	13,246	.34
86. Franklin	13,274	.34
87. Columbia	13,423	.34
88. Fannin	13,620	.35
89. Ben Hill	13,633	.35
90. Peach	13,846	.35
91. Liberty	14,487	.37
92. Haralson	14,543	.37
93. Screven	14,919	.38
94. Barrow	14,485	.37
95. Hart	15,229	.39
96. Brooks	15,292	.39
97. Tattnall	15,837	.40
98. Dodge	16,483	.42
99. Worth	16,682	.42
100. Douglas	16,741	.42
101. Toombs	16,837	.43
102. Jefferson	17,468	.44

[fol. 41]

EXHIBIT "D" TO COMPLAINT

Counties	Population	Percent
106. Henry	17,619	.45
107. Crisp	17,768	.45
108. Emanuel	17,815	.45
109. Elbert	17,835	.45
110. Wayne	17,921	.45
111. Grady	18,015	.46
112. Habersham	18,116	.46
113. Stephens	18,391	.47
114. Jackson	18,499	.47
115. Washington	18,903	.48
116. Gordon	19,228	.49
117. Mitchell	19,652	.50
118. Meriwether	19,756	.50
119. Chattooga	19,954	.51
120. Walton	20,481	.52
121. Burke	20,596	.52
122. Newton	20,999	.53
123. Catoosa	21,101	.54
124. Coffee	21,953	.56
125. Cherokee	23,001	.58
126. Tift	23,487	.60
127. Upson	23,800	.60
128. Bulloch	24,263	.62
129. Sumter	24,652	.63
130. Decatur	25,203	.64
131. Polk	28,015	.71
132. Bartow	28,267	.72
133. Coweta	28,893	.73
134. Laurens	32,313	.82
135. Colquitt	34,048	.86
136. Ware	34,219	.87
137. Thomas	34,319	.87
138. Baldwin	34,064	.86
139. Spalding	35,404	.90
140. Carroll	36,451	.92
141. Houston	39,154	.99
142. Glynn	41,954	1.06
143. Whitfield	42,109	1.07
144. Gwinnett	43,541	1.10
145. Walker	45,264	1.15
146. Clarke	45,363	1.15
147. Clayton	46,365	1.18
148. Troupe	47,189	1.20
149. Lowndes	49,270	1.25
150. Hall	49,739	1.26
151. Floyd	69,130	1.75
152. Dougherty	75,680	1.82
153. Cobb	114,174	3.09
154. Richmond	135.601	3.44

[fol. 41a]

111. Grady	16,015	.46
112. Habersham	18,116	.46
113. Stephens	18,391	.47
114. Jackson	18,499	.47
115. Washington	18,903	.48
116. Gordon	19,228	.49
117. Mitchell	19,652	.50
118. Meriwether	19,756	.50
119. Chattooga	19,954	.51
120. Walton	20,481	.52
121. Burke	20,596	.52
122. Newton	20,999	.53
123. Catoosa	21,101	.54
124. Coffee	21,953	.56
125. Cherokee	23,001	.58
126. Tift	23,487	.60
127. Upson	23,800	.60
128. Bulloch	24,263	.62
129. Sumter	24,652	.63
130. Decatur	25,203	.64
131. Polk	28,015	.71
132. Bartow	28,267	.72
133. Coweta	28,893	.73
134. Laurens	32,313	.82
135. Colquitt	34,048	.86
136. Ware	34,219	.87
137. Thomas	34,319	.87
138. Baldwin	34,064	.86
139. Spalding	35,404	.90
140. Carroll	36,451	.92
141. Houston	39,154	.99
142. Glynn	41,954	1.06
143. Whitfield	42,109	1.07
144. Gwinnett	43,541	1.10
145. Walker	45,264	1.15
146. Clarke	45,363	1.15
147. Clayton	46,365	1.18
148. Troupe	47,189	1.20
149. Lowndes	49,270	1.25
150. Hall	49,739	1.26
151. Floyd	69,130	1.75
152. Dougherty	75,680	1.82
153. Cobb	114,174	3.09
154. Richmond	135,601	3.44
155. Bibb	141,249	3.58
156. Muscogee	158,623	4.02
157. Chatham	188,299	4.78
158. DeKalb	256,782	6.51
159. Fulton	556,326	14.11

[fol. 41a]

44

Counties by Categories of population size			Proportionate share of voting strength of legislatures:		Average Values of the vote for representation as percentages of the state wide average:		
CATEGORY	No.	Total population in Census year	No. of Members Lower House	Upper House	Lower House	Upper House	Legislature.
GEORGIA							
Under 25,000	129	1,446,108	138.00	35.43*	184	179	182*
25,000-99,999	23	945,954	46.00	12.54*	94	97*	96*
100,000-499,999	6	994,728	18.00	2.33**	35	17	26
500,000 & over	1	556,326	3.000	1.00	10	13	12
Totals & Averages	159	3,943,116	205.00	51.30***	100	100	100
TENNESSEE							
Under 25,000	63	900,988	41.97	13.03	168	156	162
25,000-99,999	27	1,036,772	33.39	11.55	116	120	118
100,000-499,999	4	1,002.310	15.64	5.46	56	59	58
500,000 & over	1	627,019	8.00	2.96	46	51	49
Totals & averages	95	3,567,089	99.00	33.00	100	100	100

NATIONAL AVERAGES FOR ALL 50 STATES

Under 25,000	171
25,000-99,999	123
100,000-499,999	81
500,000 and over	76

[fol. 42]

* Does not take into account the increased representation and percentage of vote values accruing to counties of less than 25,000 population, and detracting from counties of more than 25,000 population under the Senate Rotation System, Code Section 47-102.1, Ga. Laws, 1946.

** Based on Senate Rotation System Code Section 47-102.1, Ga. Laws, 1946.

*** The Senate is actually composed of 54 members and the difference of 2.7 should, as a practical matter, be added to the total of those counties having less than 25,000 population. Likewise a certain amount of senatorial representation listed for the counties in the category of 25,000-99,999 should be subtracted from that category and added to the senatorial representation in the counties in the category under 25,000 to reflect the advantages accruing to counties in the under 25,000 category by virtue of the Senate Rotation System.

EXHIBIT "E" TO COMPLAINT

[fol. 43] [File endorsement omitted]

ORDER—April 4, 1962

Tender of the within and foregoing Complaint is acknowledged. The same is ordered filed, this 4th day of April, 1962.

Lewis R. Morgan, Judge, U. S. District Court, Atlanta Division.

[fol. 44]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action File No. 7883

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN, Plaintiffs,

v.

BEN W. FORTSON, JR., as Secretary of State of Georgia; EUGENE GUNBY, Ordinary of Fulton County, Georgia; KATHERINE E. MANN, Ordinary of DeKalb County, Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia; A. B. TOLLISON, Ordinary of Forsyth County, Georgia; ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Ga.; JIM W. DICKERSON, Ordinary of Cherokee County, Ga., et al., Defendants.

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Francis Shackelford, Esq., plaintiff's attorney, whose address is Citizens and Southern National Bank Building, Atlanta, Georgia, an answer to the complaint which is here-

with served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

C. B. Meadows, Clerk of Court; Robert J. Tidwell, Deputy Clerk.

Date: April 4, 1962. [Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 45] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

Civil Action No. 7883

[Title omitted]

MOTION TO AMEND COMPLAINT—Filed May 16, 1962

Plaintiffs move the Court for leave to amend their complaint on file herein in the following particulars:

1.

Amend paragraph I of said complaint by striking therefrom the last paragraph thereof and adding in lieu thereof the following:

"Additionally, this Court has jurisdiction under 62 Stat. L 932, 28 U.S.C. Section 1343 (3) and (4). This section reads as follows:

"Section 1343. Civil rights.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person; . . .

. . . .

[fol. 46] (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637."

2.

Amend the prayers of said complaint by striking from prayer (b) the following language:

"and Article I, Section I, Paragraphs II, III and XXV of the Constitution of the State of Georgia;"

so that after amendment said prayer (b) shall read as follows:

"That this Court hold and decree Code Sections 34-3219 through 34-3222, inclusive of the Georgia Code to be void and invalid, as being contrary to the Fourteenth Amendment of the Constitution of the United States."

3.

Amend the prayers of said complaint by striking from prayer (c) the following language:

"and Article I, Section I, Paragraphs II, III and XXV of the Constitution of the State of Georgia;"

so that after amendment said prayer (c) shall read as follows:

"That this Court hold and decree that Code Sections 47-102 and 47-102.1 of the Georgia Code are void and invalid as being contrary to the Fourteenth Amendment of the Constitution of the United States."

4.

Amend Exhibit A attached to said complaint by adding after Senatorial District 11, in the column headed "Percent", the figure 0.72.

[fol. 47]

5.

Amend Exhibit D attached to said complaint by striking from the second page thereof the percentage 3.09 which appears opposite No. 153, Cobb County, and inserting in lieu thereof the figure 2.89 in the column headed "percentage".

This the 15th day of May, 1962.

Francis Shackelford, An Attorney for Plaintiffs and Representative of the other Attorneys for Plaintiffs, viz., Hamilton Lokey, Joseph B. Cumming, Edward S. White, Israel Katz, William B. Gunter, A. R. Kenyon, Maurice N. Maloof, C. Baxter Jones, Jr., J. Quentin Davidson, Albert P. Reichert, John E. Simpson, Raymond M. Reed, John W. Sognier; 1220 Citizens & Southern National Bank Building, Atlanta 3, Georgia.

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 7883

[Title omitted]

ORDER—May 16, 1962

Plaintiffs having moved the Court for leave to amend the Complaint in the above matter in the particulars set forth in the foregoing and attached Motion to Amend,

After consideration, it is ordered that Plaintiffs' Complaint be amended in the manner and with respect to the particulars set forth in the attached and foregoing Motion to Amend, subject to the objections of the Defendants.

This 16th day of May, 1962.

Griffin B. Bell, U. S. Circuit Judge.

[fol. 49] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 7883

[Title omitted]

ANSWER OF EUGENE GUNBY, ORDINARY OF FULTON COUNTY, GEORGIA—Filed April 24, 1962

Comes now Eugene Gunby, in his official capacity as Ordinary of Fulton County, Georgia and, in answer to complainants' complaint, respectfully shows to the Court:

1.

For want of sufficient information, this defendant can neither admit nor deny the allegations of the complaint except this defendant admits those allegations specifically referring to him contained in paragraph IV of the complaint.

2.

This defendant in his official capacity will abide the final decision of this Court in this case, in so far as it becomes applicable to him.

Wherefore, this defendant prays the direction of the Court.

James M. Sibley, King & Spalding, 434 Trust Company of Georgia Building, Atlanta 3, Georgia.

Certificate of service (omitted in printing).

[fol. 50] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 7883

[Title omitted]

ANSWER AND DEFENSE OF DEFENDANTS—Filed May 1, 1962

Come now defendants and file this answer and defense to the complaint of plaintiffs and show:

First Defense

The court is without jurisdiction of the subject-matter of the suit.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

This court should abstain from exercising its equitable jurisdiction pending an authoritative interpretation by state courts of the provisions of Section 2 of the Act approved February 1, 1946 (Ga. Laws 1946, pp. 42, 44), as amended by an act approved February 14, 1950 (Ga. Laws 1950, p. 165), codified as Code Ann., Sec. 47-102.1, providing a "rotation plan" for selection of state senators, and of the provisions of that act approved March 23, 1939 (Ga. Laws 1939, p. 311), codified as Code Ann., Secs. 34-3219 [fol. 51] through 34-3222, inclusive, requiring that primary elections for members of the state senate be conducted only in the county whose turn it is under the rotation plan to furnish such senator. Defendants show that neither of the aforesaid acts have received an interpretation by any courts of the State of Georgia, and such interpretation might eliminate some of the federal constitutional questions raised by the complaint, and render constitutional adjudication unnecessary by this court.

Fourth Defense

This court should abstain from exercising its equitable jurisdiction pending study and recommendations by a special committee of the General Assembly, created by the House of Representatives at the Extraordinary Session just ended, a copy of said Resolution creating said committee being attached hereto, marked "Exhibit A" and made a part hereof.

Fifth Defense

The defendants answer the several paragraphs of the complaint as follows:

1.

Paragraph I alleges matters of law requiring no answer.

2.

Paragraph II alleges matters of law requiring no answer.

3.

For want of information sufficient to form a belief, defendants are unable either to admit or deny paragraph III.

4.

Answering paragraph IV, defendants admit that their residences and official positions as therein alleged are correct. Insofar as said paragraph alleges that defendants have certain duties, defendants say that their duties as public officers are defined by law, of which this court can take judicial notice. Insofar as said paragraph alleges that said action is brought against these defendants named as ordinaries as representative of all the ordinaries in the State of Georgia, defendants deny that this is a proper [fol. 52] class action or that it is impracticable to bring all of said ordinaries before this court.

5.

Paragraph V is denied.

6.

Answering paragraph VI, insofar as said paragraph alleges matters of law, it requires no answer. Further answering said paragraph, defendants deny that the present plan of legislative apportionment of members of the General Assembly of Georgia denies to plaintiffs or any other persons the equal protection of the laws.

7.

Answering paragraph VII, defendants admit that there has been no constitutional convention assembled in Georgia since 1877. The remainder of said paragraph alleges matters of law and contentions of the plaintiffs, which require no answer.

8.

Answering paragraph VIII, the first sentence thereof alleges matters of law requiring no answer. Answering the second sentence of said paragraph, defendants say that they know of no occasion on which the people of Georgia have been refused the right to assemble in constitutional convention for the purpose of considering reapportionment of the General Assembly.

9.

Paragraph IX alleges matters of law requiring no answer.

10.

Answering paragraph X, defendants show that on April 28, 1962, a special three-judge court, convened pursuant to 28 USCA 2281, held unconstitutional and unenforceable in their present form, the provisions of state law requiring the consolidation and tabulation of votes in primary [fol. 53] elections according to the county unit method. For want of information sufficient to form a belief, defendants are unable either to admit or deny that nominations in the Democratic primary have been tantamount to election in the State of Georgia since 1870. The remaining

allegation of said paragraph alleges a conclusion requiring no answer.

11.

For want of information sufficient to form a belief, defendants are unable either to admit or deny paragraph XI.

12.

For want of information sufficient to form a belief, defendants are unable either to admit or deny paragraph XII.

13.

For want of information sufficient to form a belief, defendants are unable either to admit or deny the accuracy of the figures alleged in paragraph XIII..

14.

For want of information sufficient to form a belief, defendants are unable either to admit or deny the accuracy of the figures alleged in paragraph XIV. The remaining allegations of said paragraph are denied.

15.

Paragraph XV alleges matter of law requiring no answer.

16.

Paragraph XVI requires no answer.

17.

Answering paragraph XVII, defendants deny that any of the laws or alleged acts or failures to act deny to plaintiffs the equal protection of the laws. Defendants have no information as to the accuracy of the matters set forth in "Exhibit A".

18.

Paragraph XVIII alleges matters of law requiring no answer.

19.

Answering paragraph XIX, defendants have no informa-
[fol. 54] tion as to the accuracy of the figures therein alleged and referred to, including "Exhibit A", but defendants deny that the composition of any of said senatorial districts is arbitrary or capricious.

20.

Paragraph XX alleges matters of law requiring no answer.

21.

Insofar as paragraph XXI alleges matters of law, it requires no answer. The remaining allegations of said paragraph are denied.

22.

For want of information sufficient to form a belief, defendants are unable either to admit or deny paragraph XXII.

23.

Paragraph XXIII is denied.

24.

Paragraph XXIV is denied.

25.

Answering paragraph XXV, defendants say that the constitutional provisions therein referred to are valid and do not deny the legal right of plaintiffs, and that the apportionment and allocation of said 205 representatives likewise is valid and constitutional. Defendants have no information as to the accuracy of the figures set forth in "Exhibit D".

26.

Paragraph XXVI alleges matters of law requiring no answer.

27.

Paragraph XXVII is denied.

28.

Paragraph XXVIII is denied.

29.

Paragraph XXIX is admitted.

[fol. 55]

30.

Paragraph XXX is denied.

31.

Answering paragraph XXXI, defendants deny that plaintiffs are entitled to the relief therein stated.

32.

Answering paragraph XXXII, for want of information sufficient to form a belief, defendants are unable either to admit or deny the accuracy of the figures referred to in "Exhibit E". The remaining allegations of said paragraph are denied.

33.

For want of information sufficient to form a belief, defendants are unable either to admit or deny paragraph XXXIII.

34.

For want of information sufficient to form a belief, defendants are unable either to admit or deny the accuracy of the percentages alleged in paragraph XXXIV.

35.

For want of information sufficient to form a belief, defendants are unable either to admit or deny paragraph XXXV.

36.

For want of information sufficient to form a belief, defendants are unable either to admit or deny paragraph XXXVI.

37.

Paragraph XXXVII alleges matters of law requiring no answer.

38.

For want of information sufficient to form a belief, defendants are unable either to admit or deny paragraph XXXVIII.

39.

Paragraph XXXIX, XL, XLI, XLIV and XLV are denied.

[fol. 56]

40.

Answering paragraph XLII, defendants admit that they will perform the duties of their offices as prescribed by law. Defendants deny that plaintiffs are entitled to the relief therein asserted.

41.

Answering paragraph XLIII, defendants admit that the next General Election for members of the General Assembly of Georgia is set for the second Tuesday in November, 1962. The remainder of said paragraph is denied.

Wherefore, defendants pray that the prayers of the complaint be denied, that the complaint be dismissed, and that defendants be discharged with their costs.

Eugene Cook, Attorney General of Georgia; Judicial Bldg., Capitol Square, Atlanta, Georgia;

B. D. Murphy, Deputy Assistant Attorney General; C & S Bank Bldg., Atlanta, Georgia;

E. Freeman Leverett, Deputy Assistant Attorney General; Elberton, Georgia,

Lamar W. Sizemore, Deputy Assistant Attorney General; Suite 715, C & S Bank Bldg., Atlanta, Georgia;

Attorneys for Defendants.

[fol. 57] *Duly sworn to by Ben W. Fortson, Jr., jurat omitted in printing.*

Certificate of Service (omitted in printing).

[fol. 58]

EXHIBIT "A" TO ANSWER

H. R. No. 44

By: Mr. Smith of Emanuel

A RESOLUTION

Creating a House of Representatives Committee on Reapportionment; defining its membership, powers, and duties; and for other purposes.

WHEREAS, on March 26, 1962, in the case entitled *Baker* v. *Carr*, 7 L. Ed. 2d 663, the United States Supreme Court, ignoring precedent and departing from the traditional separation-of-powers scheme of federalism, declared that henceforth federal courts should exercise jurisdiction to consider complaints by litigants seeking to compel reapportionment of state legislative bodies; and

WHEREAS, this House of Representatives has never failed to reapportion the House of Representatives after each federal decennial census, pursuant to the Constitution of Georgia, Art. III, Sec. III, Par. II, thereby distinguishing the situation in Georgia from that prevailing in other states where similar litigation is pending; and

WHEREAS, nothwithstanding the foregoing, there has been filed in the United States District Court for the Northern District of Georgia, a case entitled *Toombs, et al.* v. *Fortson, et al.*, attacking the validity of constitutional and statutory provisions governing apportionment of the General Assembly and providing for the constitution of senatorial districts and the election of Senators; and

WHEREAS, suit has also been filed in said Court, a case entitled *Wesberry, et al.* v. *Fortson, et al.*, attacking the composition of existing Congressional Districts in Georgia; and

WHEREAS, it is therefore appropriate and desirable that a careful, deliberate and comprehensive study be made of the problem in the light of the aforesaid Supreme Court decision and pending litigation to the end that the government of the State shall be one of laws and not of men; and

WHEREAS, the complexities and difficulties inherent in such a study are of the gravest and most profound consequence to the citizens of Georgia, and are of such a nature as to compel, *ex aequo et bono*, that public hearings be conducted so as to receive suggestions and recommendations from the people themselves; and

WHEREAS, consideration of time, economy and polity demand that such fundamental and momentous decisions not be determined by this General Assembly without receiving public expression as hereinbefore referred to;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that there be and is hereby created and established a Committee on Reapportionment which shall consist of thirteen (13) members as follows: The present Presidents of the following organizations: County Commissioners Association of Georgia; Georgia Municipal Association; Superior Court Judges Association; Georgia Farm Bureau; Georgia Education Association; Georgia Bar Association; State Chamber of Commerce; Peace Officers Association; five members of the House of Representatives to be appointed by the Speaker of the House;

The jurisdiction of said Committee shall extend to holding hearings and making a careful and complete study of all laws relating to composition and apportionment of the Senate and House of Representatives, the constitution and geographical arrangement of senatorial districts, and all other laws and constitutional provisions governing the composition, organization, election and apportionment of senators and representatives, and the constitution and geographical arrangement of congressional districts.

Said Committee shall convene as soon as practicable after the adjournment of the present session, and organize by electing a Chairman and other officers, and adopting such rules and procedures as may be promulgated by the Committee, and proceed with its study and holding of public hearings in such parts of the State as it deems necessary or desirable.

BE IT FURTHER RESOLVED that this Committee shall make positive recommendations to the 1963 Session of the General Assembly concerning its findings pursuant to the mandate hereinbefore declared, which recommendations shall be made in writing and published at the earliest practicable date. Thereupon the Committee shall stand abolished.

BE IT FURTHER RESOLVED that the members of the House shall receive compensation, per diem, expenses and allowances for service on said Committee. The other members shall receive no compensation, per diem, expenses or allowances for service on said Committee. The funds necessary for the purposes of this resolution shall be paid from the funds appropriated to or available to the legislative branch of the Government or from any other available funds.

[fol. 59] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 7883

[Title omitted]

ANSWER OF KATHERINE E. MANN, AS ORDINARY OF DEKALB COUNTY, GEORGIA—Filed May 4, 1962

Comes now Katherine E. Mann as Ordinary of DeKalb County, Georgia, and in answer to Plaintiffs' complaint respectfully says:

1.

Paragraphs I and II of Plaintiffs' complaint are admitted.

2.

For want of sufficient information this Defendant can neither admit nor deny Paragraph III of the complaint.

3.

Defendant admits the allegations in Paragraph IV of Plaintiffs' complaint referring to this Defendant.

4.

Paragraph V of Plaintiffs' complaint requires no answer by this Defendant since same sets forth no facts but alleges the contentions of the Plaintiffs.

5.

Paragraph VI of Plaintiffs' complaint is admitted except this Defendant shows that the allegation of denial of equal protection is a legal conclusion.

6.

For want of sufficient information this Defendant can neither admit nor deny the allegations of Paragraph VII of the complaint but this Defendant does admit that the populous counties of Georgia do not have sufficient repre-
[fol. 60] sentatives in each House of the General Assembly to obtain a two-thirds vote of each house.

7.

For want of sufficient information Defendant can neither admit nor deny the allegations of Paragraph VIII of Plaintiffs' complaint.

8.

Paragraph IX of Plaintiffs' complaint is a legal conclusion requiring no answer.

9.

For want of sufficient information this Defendant can neither admit nor deny the allegations of Paragraph X of the complaint but this Defendant does admit that at the present time nominations in the Democratic Primary are tantamount to election.

10.

For want of sufficient information this Defendant can neither admit nor deny the allegations of Paragraphs XI and XII of Plaintiffs' complaint.

11.

For want of sufficient information this Defendant can neither admit nor deny the allegations of Paragraph XIII of the complaint except that this Defendant does admit that under the present apportionment of the General Assembly of Georgia legislation may be enacted by representatives from counties whose combined population would be considerably less than fifty per cent (50%) of the State population.

12.

In answer to Paragraph XIV of Plaintiffs' complaint this Defendant admits that there has been a shift in population from the rural areas to the urban areas but for want of sufficient information can neither admit nor deny the [fol. 61] other allegations of this Paragraph.

13.

Paragraphs XV and XVI of Plaintiffs' complaint are admitted.

14.

The allegations of fact contained in Paragraph XVII of Plaintiffs' complaint are admitted but the conclusions contained therein are matters of law to be determined by the Court.

15.

Paragraphs XVIII, XIX and XX of Plaintiffs' complaint are admitted.

16.

Further answering Paragraph XX of Plaintiffs' complaint this Defendant says that DeKalb County, the second most populous county in the State of Georgia with a population of 256,782 according to the 1960 United States Census, will not be entitled to elect a Senator from this County or to vote for the Senator from the Senatorial District in which DeKalb County is located in the 1962 election.

17.

Paragraph XXI of Plaintiffs' complaint is admitted.

18.

For want of sufficient information this Defendant can neither admit nor deny the allegations of Paragraph XXII of the complaint.

19.

Paragraphs XXIII and XXIV are contentions of the Plaintiffs requiring no answer by this Defendant.

20.

For want of sufficient information this Defendant can neither admit nor deny the allegations of Paragraph XXV of Plaintiffs' complaint.

[fol. 62]

21.

Paragraphs XXVI, XXVII, XXVIII, XXIX, XXX and XXXI of the complaint set forth contentions of the Plaintiffs requiring no answer by this Defendant.

22.

For want of sufficient information this Defendant can neither admit nor deny the allegations of Paragraphs

XXXII, XXXIII, XXXIV, XXXV and XXXVI of Plaintiffs' complaint.

23.

Paragraphs XXXVII and XXXVIII and XXXIX of Plaintiffs' complaint are admitted.

24.

Paragraphs XL and XLI of Plaintiffs' complaint are contentions of the Plaintiffs requiring no answer by this Defendant.

25.

In answer to Paragraph XLII of the complaint this Defendant says that she will perform such duties as may be required of her by law.

26.

Paragraphs XLIII, XLIV and XLV of Plaintiffs' complaint are contentions of the Plaintiffs requiring no answer by this Defendant.

Wherefore having fully answered, this Defendant prays the direction of the Court.

George P. Dillard, Herbert O. Edwards, Robert E. Mozley, Attorney for Defendant Katherine E. Mann, As Ordinary of DeKalb County, Georgia; 538 Church Street, Decatur, Georgia.

[fol. 63] *Duly sworn to by Mrs. Katherine E. Mann, jurat omitted in printing.*

[fol. 64] Certificate of Service (omitted in printing).

[fol. 65] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 7883

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON AND JOHN L. GLENN, Plaintiffs,

—versus—

BEN W. FORTSON, JR., as Secretary of State of Georgia, EUGENE GUNBY, Ordinary of Fulton County, Georgia, KATHERINE E. MANN, Ordinary of DeKalb County, Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia, A. B. TOLLISON, Ordinary of Forsyth County, Georgia, ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia, JIM W. DICKERSON, Ordinary of Cherokee County, Georgia, et al., Defendants.

Before TUTTLE and BELL, Circuit Judges, MORGAN, District Judge.

TUTTLE, Circuit Judge:

OPINION AND ORDER—May 25, 1962

This is the second suit to be tried before a three-judge court sitting in and for the Northern District of Georgia, in which Georgia citizens seek relief from alleged unconstitutional inequalities existing under the present composition of the Georgia state governmental structure. The first suit, *Sanders v. Gray*, 203 F. Supp. 158, resulted in the court's holding that the county unit system by which political party primaries have been required to be held for the election of certain State House offices is invalid because of the wide disparity between the number of units allocated to the sev-

eral counties in the State when compared with the population of the counties.[1]

[fol. 6] In this case the plaintiffs, residents of the two most populous counties in the state of Georgia, Fulton and DeKalb Counties, seek declaratory and injunctive relief to cause the reapportionment of the General Assembly of the state of Georgia, a bi-cameral legislative body consisting of a Senate and House of Representatives, to the end that the plaintiffs and the other citizens of the counties in which they reside will be represented in the Legislature by members chosen on the basis of population, rather than on the basis of geographical areas, such as counties or election districts.

Both of these suits were filed after the Supreme Court's recent decision was announced in Baker v. Carr, —— U.S. ——, 30 L.W. 4203.

The plaintiffs, suing on behalf of themselves "and others similarly situated," named as defendants Ben W. Fortson, Jr., Secretary of State of the State of Georgia, and six other defendants who are the duly elected Ordinaries of selected Georgia counties.[2] This is a proper case for determination by a bench composed of three judges as provided in 28 U.S.C.A. 2281, inasmuch as it seeks interlocutory and permanent injunctions to restrain the enforcement, operation and execution of statutes and constitutional provisions of the state of Georgia on the ground that they conflict with the Constitution of the United States. The basis of the plaintiff's attack is that "the Georgia constitutional and statutory provisions herein attacked comprise a scheme of apportionment of elected representatives [to the State Legislature] whereby the representation accorded to plaintiffs and other voters in this area has been and is arbitrarily, [fol. 67] substantially, and persistently less than that accorded to voters in other areas."

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[1] A direct appeal has now been filed and is pending before the Supreme Court, in which the enjoined officials of the State of Georgia seek review of this decision.

[2] The Ordinary in Georgia is the county officer whose duty it is to supervise primary and general elections.

The facts are not in dispute. They are, essentially, as follows: The Georgia Legislature consists of two Houses—the Senate and the House of Representatives. The Georgia Senate has fifty-four members, each of whom is elected from a senatorial district. With two exceptions, these senatorial districts are groupings of three counties each, which are contiguous, the two exceptions being the First senatorial district consisting of Chatham County and Effingham County, and the Fifty-Second senatorial district consisting of Fulton County. At the time these exceptions were made, Fulton County was the largest county in the State in population, and Chatham County was the second largest. The remaining senatorial districts are so created as to bear no relation to the population—that is to say, there is no uniformity or approximate uniformity as between the remaining fifty-two senatorial districts.

The House of Representatives consists of 205 members representing the 159 counties of the State. The Constitution of the State of Georgia provides that the eight largest counties in population shall have three representatives each, the thirty next largest counties have two each, and the remaining 121 counties have one representative each. The population in the counties varies from a low of 1876 people in Echols County, to 556,326 in Fulton County, both according to the 1960 United States Census. In addition to the great disparity between the populations of the various senatorial districts, varying from 13,050, the smallest in population, to 556,326, the largest, Georgia laws provide that in all except the two senatorial districts above referred to, Senators shall not succeed themselves, or be succeeded by citizens of the same county. The law requires that the three counties constituting a senatorial district shall furnish the Senator of the district in rotation.[3]

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[3] Section 47-102.1 of the Georgia Code Annotated, provides in material part as follows:

> "*Senators to be Furnished by Counties in Rotation.* The first county named in each of the above districts shall furnish the Senator for the 1946 General Election, and after that the counties in order named above shall furnish the Senator for that district . . ."

[fol. 68] Furthermore, there are other provisions of the Georgia statutes that provide that where a county's candidate for election to the Senate is chosen by a primary election, only those voters from the county which is to furnish the election under the rotation system may vote in the primary. Thus the residents of two out of the three counties may not even participate in the primary which selects candidates for the senatorial district in which they reside.

Additional facts of which the Court takes judicial notice, or which were proved on the trial having a bearing on the issues here to be decided include the following:

(a) Based upon the 1960 United States Census, Senators from the 28 least populous senatorial districts of Georgia comprising a constitutional majority of the 54 members of the Senate represent districts having 21.4% of the people of the State.

(b) Under the rotation system above described, the respective counties in the 28 least populous senatorial districts of the State, which counties would be entitled to have the Senator for such respective districts at the next session of the General Assembly, have approximately 6.13% of the State's population.

(c) Of the 54 senatorial districts, the twelve most populous districts contained 55.8% of the population of Georgia. Percentage-wise these twelve senators from these districts, constituting more than a majority of the population of the State, constitute 22.2% of the total number of members of the State Senate.

(d) The 19 least populous senatorial districts of the State possess only 13% of the population of Georgia, but the Senators from these 19 senatorial districts have one [fol. 69] more than the one-third vote needed to prevent the required two-thirds vote of the Senate to permit the submission of any constitutional amendment to the people.

(e) Representatives from the 103 least populous counties of the State, comprising a constitutional majority of the 205 members of the House of Representatives, represent counties having approximately 22½% of the population of Georgia.

(f) The eight most populous counties, containing 41% of the population of the State, elect 24 of the 205 total Representatives in the House of Representatives, constituting 11.7% of the total number of Representatives in the lower House.

(g) The 69 least populous counties having 12.17% of the total population of the State are represented by one more member of the House of Representatives than the one-third needed to prevent a two-thirds vote of the House to permit the submission of a constitutional amendment to the people of the State.

(h) Taxpayers of Fulton County, Georgia, which county has a population equalling 14% of the total of the State, provide more than 14% of the State's total revenue. Fulton County is represented in the House of Representatives by 1.4% of the Representatives in the lower House. Fulton County's one Senator is 1.8% of the total number of Senators in the upper chamber.

i) The five-county area of Fulton, DeKalb, Cobb, Clayton and Gwinnett, which comprise the metropolitan area of the city of Atlanta, has approximately 25% of the State's population, furnishes more than 25% of the total State revenue, and has 4.3% of the Representatives in the State House of Representatives. These counties are part of senatorial districts that combined have approximately 6% of the representation in the Senate.

[fol. 70] (j) The eight most populous counties in the State have approximately 41% of the population, furnish more than 41% of the total State revenue and are represented in the House of Representatives by 11.7% of the total number of Representatives in the lower House. These counties are parts of senatorial districts that together have approximately 13% of the membership of the Senate.

Several efforts have recently been made by individual members of the Georgia General Assembly to obtain legislation modifying in some degree the basis of representation, either by simple legislation to modify the districts for senatorial representation, or by proposing legislative study committees to consider proposed constitutional amend-

ments to modify the 3-2-1 formula of representation in the House of Representatives. These efforts have been of no avail other than the appointment by the House of Representatives, without the concurrence of the Senate, of two House study committees on reapportionment which have thus far made no recommendations touching on reapportionment of either House of the Legislature.

Following the filing of this suit and the suit in *Sanders* v. *Gray*, supra, the Governor of the state of Georgia called the General Assembly into special session for the purpose of considering legislative reapportionment and the matters dealing with the county unit system of voting. That session of the General Assembly modified to some extent the county unit system, which, however, has now been held by the Court in *Sanders* v. *Gray*, supra, to be invalid, took no action with respect to reapportionment of the Legislature other than creation of one of the committees above referred to and has now adjourned.

Jurisdiction, Justiciability, and Standing to Sue.

[fol. 71] Defensive pleadings filed on behalf of the Secretary of State and four of the defendant Ordinaries assert the following defenses:

(a) The Court is without jurisdiction of the subject matter of this suit.

(b) The complaint fails to state a claim upon which relief can be granted.

(c) The Court should abstain from exercising its equitable jurisdiction so far as it would otherwise consider the constitutionality of the Senate rotation plan as set out in Georgia Code, Annotated, Section 47-102, et seq., pending an authoritative interpretation by the courts of Georgia of this section of the State laws.

(d) This Court should abstain from exercising its equitable jurisdiction pending study and recommendations by a special committee of the General Assembly created by the House of Representatives at the extraordinary session just ended.

(e) A general denial of the allegations of the complaint.

Defendant Ordinary Eugene Gunby of Fulton County answered merely by stating that he would comply with the requirements of the statutes in whatever manner they should be contrued. In effect his answer merely stated that the defendant, in his official capacity, would abide the final decision of the Court insofar as it becomes applicable to him, whereupon he prayed the direction of the Court.

The defendant Ordinary Mrs. Katherine Mann of DeKalb County, conceded jurisdiction and conceded that the complaint stated a claim upon which relief could and should be granted. Her answer also expressly agreed that the Senate rotation plan was invalid, and in her brief she conceded that it should be set aside. Mrs. Mann's answer also conceded all the factual allegation in the complaint.

Even a casual reading of the Supreme Court's opinions, [fol. 72] both the majority opinion and the concurring opinions, in *Baker* v. *Carr*, supra, makes it clear that this Court has jurisdiction of the subject matter, that the issues here drawn are justiciable issues, and that these plaintiffs have standing to sue. The five defendants here who attack the plaintiffs standing were unable to distinguish the situation in which these plaintiffs find themselves from that of the plaintiffs in the *Baker* case. There the Supreme Court said:

> "These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the state's constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality, vis-a-vis voters in irrationally favored counties. A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such im-

> pairment resulted from dilution by a false tally, c.f. United States v. Classic, 313 U.S. 299; or by refusal to count votes from arbitrarily selected precincts, c.f. United States v. Mosley, 238 U.S. 383, or by a stuffing of the ballot box, c.f. ex parte Siebold, 100 U.S. 371; United States v. Saylor, 322 U.S. 385."

Furthermore, the opinion stated:

> "They are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' Coleman v. Miller, 307 U.S. at 438, not merely a claim of 'the right possessed by every citizen to require that the government be administered according to law' . . . Fairchild v. Hughes, 258 U.S. 126, 129."

As the District Court said in Sanders v. Gray, supra, at page 166:

> "That case involved the apportionment of the Tennessee State Legislature. The court held that the District Court possessed jurisdiction of the subject matter, and that a justiciable cause of action was stated upon which the appellants, residents and voters of Tennessee claiming arbitrary and capricious state action offensive to the Fourteenth Amendment, had standing to maintain the suit. The rationale of that decision encompasses the cause of action here. We, accordingly, take jurisdiction and also hold that plaintiff has standing to maintain the suit and that the complaint sets out a justiciable issue."

So, too, do we now hold that this Court should take jurisdiction to determine what we consider to be a justiciable is-
[fol. 73] sue, and we further hold that the plaintiffs have standing to maintain the suit, and that the complaint alleges facts upon which relief can be granted.

So far as concerns the defense of abstention touching on the validity of the senatorial rotation statute, we need say only that once the court finds that it has jurisdiction and power to act, and that the complaint presents a case which in general demands consideration by a Federal District Court, this Court should not abstain from disposing of the

entire case rather than leaving part of it in limbo pending a later decision by a State court. So far as our abstaining from deciding the case as a whole on its merits is concerned, we think again that the contention of the five defendants urging this course of action is fully answered by the action of the Supreme Court in *Baker* v. *Carr*. We conclude that this is not a case for abstention.

The Question Presented

The complaint in this case sufficiently alleges a case of invidious discrimination against the plaintiffs on the basis that their participation in the fashioning of the laws by which they are to be governed is fixed by a State constitutional and legislative scheme of apportionment of elected representatives in the State Legislature, which accords to voters in the area of which plaintiffs are citizens, representation which is arbitrarily, substantially, and persistently less than that accorded to voters in other areas of the State. Only two questions remain for our determination. The first is: do the undisputed facts constitute "invidious discrimination" against the plaintiffs and those similarly situated within the meaning of this term as used by the United States Supreme Court in its latest decision? The second is: assuming an affirmative answer to the first question, what relief are the plaintiffs entitled to at the hands of the Court?

[fol. 74] *The Test to be Applied*

Having decided that the equal protection clause of the Fourteenth Amendment to the Federal Constitution measures the rights of the plaintiffs in this suit, and the Supreme Court in *Baker* v. *Carr* having decided that the test to be made under the Fourteenth Amendment is whether disparities between voting strengths in the state legislature constitute "invidious discrimination," we conclude that this Court must apply the same test in determining whether the plaintiffs' rights under the equal protection clause have been violated by a system of legislative representation in either or both of the chambers of the State Legislature in such manner or to such a degree as to constitute invidious discrimination as to them.

Here, as in *Sanders* v. *Gray*, "a test for invidiousness must be formulated. Unlike per se invidiousness, springing from discrimination based on race, creed or color, we must here deal with discrimination not so infected, but arising out of a State legislative classification diffusing . . . political strength. The diffusion is between counties of all sizes, sparsely to densely populated, apparently on a rural-urban basis, but weighted from top to bottom, county by county, in favor of the next smaller."

Again, as was said in Sanders v. Gray, "we make the test on a consideration of all relevant factors, and these include rationality of state policy. See the concurring opinion of Mr. Justice Clark in Baker v. Carr, where the dismissal of the appeal in South v. Peters, supra, was said to reflect the viewpoint of the Supreme Court 'to refrain from intervention where there is some rational policy behind the state system.'" Dealing, therefore, first with the question of ra-
[fol. 75] tionality of state policy, we comment on the fact that no factual evidence has been presented to the Court upon which the Court can posit any finding, as a finding of fact, that a state policy exists which justifies the great disparities in legislative representation between the counties in which plaintiffs reside and the many other counties of the State whose representative strength exceeds that of Fulton County by as much as 98 to 1. We are left then to speculate as to whether there may be some rational policy, and we are forced to the conclusion that there is no policy but simply a reluctance of those with grossly disproportionate power over the legislative process to surrender such power. This, in our frame of reference, is not a rational, but rather an irrational, policy.

Another test is whether or not the system is arbitrary.[1]

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[1] Webster's International Dictionary gives the following definition for "arbitrary":

"2. Fixed or arrived at through an exercise of the will or by caprice, without consideration or adjustment with reference to principles, circumstances or significances . . ."

Black's Law Dictionary defines "arbitrary":

"Without adequate determining principles; not founded in the nature of things; non-rational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; . . ."

Having concluded that the gross disparities here imbedded in the makeup of the Georgia Legislature can not be related to a rational policy, we also conclude that the system is arbitrary in any sense of that term.

[fol. 76] Another important factor to be considered in making the test is whether the present complexion of the Legislature has a historical basis in our political institutions, either federal or state. The defendants urge strenuously here that the so-called "3-2-1" system of representation in the lower House and the State senatorial district system under which the State Senate is constituted has a sound historical background in the state of Georgia, and that the United States Senate is constituted of representatives of geographical areas ignoring the fact that the National House of Representatives is based on population. They argue that these precedents justify the present system in Georgia no matter how glaring the disparities may be resulting from the shifts in population.

The Court, in the *Sanders* case, recited at some length the history of the method of apportionment in the House of Representatives of Georgia, because as was there pointed out the county unit method of electing state officials was based upon the apportionment of representatives in the lower House of the State Legislature. We do not consider it necessary to repeat at length this history of the Georgia House of Representatives which can be found at 203 F. Supp. 158, at page 161, et seq., except to point out that the history of the Georgia Legislature since the Constitution of 1868 makes it plain that the 3-2-1 formula of apportionment in the House made its first appearance at that time, and that when it made its appearance this formula was to some degree adjusted to population. History also demonstrates that tremendous shifts in population have destroyed [fol. 77] the 3-2-1 system as a population apportionment basis. The result is that what may have been a reasonable apportionment by population when the system was introduced has, through inaction, become an unreasonable system as relates to population. Only one slight modification has been made, in that there are now eight of the largest counties with three votes in the Legislature, as contrasted to the six that were formerly included. This shift, of

course, was of scant, if any, benefit to the counties in which the plaintiffs reside. Of course reapportionment has taken place after each decennial census under the 3-2-1 formula but this has afforded no relief whatever to the plaintiff here. (Ga. Code Sections 2-1501, 2-1502.)

A study of the history of the Georgia Senate reveals the fact that for at least the last 125 years election to the Senate has been on the basis of geographical areas, rather than on the basis of population, with two exceptions which will be later commented on. Originally the Senate was comprised of Senators chosen from each of the counties in the State. Later senatorial districts were created, but in 1852 these districts were abolished and the old system of allowing one senator for each county was restored. The Georgia Constitution of 1861 restored the senatorial districts which have continued down to the present time. Of Georgia's 159 counties, all but three of them are combined into three-county senatorial districts. Two of the remaining, Chatham and Effingham, comprise a separate senatorial district and Fulton County, the most populous county in the State, comprises a single senatorial district. Thus, to this very limited extent recognition has been given to the fact that the size of Chatham and Effingham Counties combined and the size of Fulton County warrant their having somewhat more [fol. 78] favored treatment than if they were combined in the normal three-county senatorial districts.

Applying these historical facts to the test of invidiousness, we are unable to discern any justification for continuing this system merely because it has an historical basis in Georgia's political institutions. This is so, primarily, because while historically the statute and constitutional requirements remain substantially the same, the passage of time and changing living habits of the people have distorted it into something entirely different from what it was at its genesis.

The next consideration which, under the guidelines laid down by the Supreme Court in *Baker* v. *Carr*, we must consider is whether there lies within the electorate of the State of Georgia any possible remedy for the gross inequalities that we have found to exist. In Georgia, as is the case in Tennessee, there is no provision in the State Con-

stitution for initiative or referendum instituted by the people to bring about a change in the Constitution or laws of the State. To argue, as do the defendants here that the plaintiffs should be remitted to the State Legislature to seek the redress which they claim is their constitutional right, would be to expect them to succeed in having those in a dominating position in the State Legislature voluntarily surrender their position. The record is barren as to the likelihood of this occurring. Indeed, the evidence is to the contrary. Their position has been assiduously and effectively enhanced at every opportunity. We conclude, as we did in *Sanders* v. *Gray*, that there is no "substantial likelihood under the existing system of plaintiffs' obtaining such relief measures as may be needed to accord him his constitutional rights."

[fol. 79] Finally, the Court also pointed out in the *Sanders* case that there is an additional factor of importance when the Federal Court is called upon to invalidate solemnly enacted State constitutions and laws. Bearing in mind the plain lesson laid down by the Supreme Court repeatedly that an alleged violation of constitutional rights by a State must be clear before a Federal Court of equity will lend its power to the disruption of the State election processes, we can not but conclude that the Supreme Court has now, in a case like this, practically laid a mandate on the trial courts to examine into such allegations of constitutional deprivations and grant such relief as the facts may require. The Supreme Court's opinion in *Baker* v. *Carr*, a case which, as has been pointed out, is completely similar to that here, ended with these words:

> "We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendent."

Conclusion as to the Merits

The test of invidious discrimination is on the sum of all of the factors which we have discussed, and if the action—

here the State statute and the State constitutional requirements complained of—offends what are found to be fundamental political concepts inherent in a republican form of government, giving due regard to each factor and to the rights of the plaintiff and to all others in his suit as compared to the whole, the State laws and the offending provisions of the Constitution must be stricken because of discrimination so excessive as to be invidious. *Sanders* v. *Gray*, 203 F. Supp. 158, 170. Viewing the extreme disparities existing in both Houses of the Legislature,[5] against the back- [fol. 80] ground of the several factors which we have taken into consideration, we are forced to the conclusion that the present composition of the Georgia Legislature amounts to invidious discrimination against the plaintiffs and all others who are residents of the counties in which plaintiffs reside. It follows, therefore, that the continued operation of the Georgia State government under a legislative system as presently constituted violates plaintiffs' right to equal protection of the law as guaranteed to them by the Fourteenth Amendment to the United States Constitution.

In most legal proceedings a court discharges its function by determining the legal question presented to it, without going further to speculate or give advice as to what alternative action might convert an institution found to be legally deficient into one that is legally acceptable. In other situations, however, particularly in view of the fact that this Court is asked to issue a declaratory judgment and to restrain certain acts dealing with the operation of the State government, it may be appropriate for the Court to suggest such guidelines as would indicate what modifications in the existing structure would meet its understanding of what is permissible. In the *Sanders* case the Court considered it appropriate because the question was "of much public moment" to indicate guidelines within which the Court considered a county unit method of election to be within con-

[5] It is alleged in the plaintiffs' complaint that there is no county in the United States as to which the disparity in voting representation in the so-called "popular chamber" is as discriminatory as it is in Georgia. No proof has been offered to establish the correctness of this allegation, but no more widely disparate legislative membership has been called to our attention.

stitutional standards. In the same way, in view of the fact that as much confusion as can possibly be eliminated touching upon the validity of an election by the people of the state of Georgia should be removed from the minds of all the citizens, we consider it appropriate to indicate the ex-
[fol. 81] tent to which, in the light of the present Supreme Court guidance the present State Legislature fails to meet constitutional standards.

Granting the plaintiffs' petition for declaratory judgment, we determine and hold that so long as the Legislature of the state of Georgia does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements.

We also determine and hold that the provisions of Sections 47-102 and 102.1 of the Georgia Annotated Code requiring rotation of senate seats among the counties of the several senatorial districts is unconstitutional and void.

It is urged by the plaintiffs here that in its decision in the case of *Scholle* v. *Hare*, supra, the Court in effect decided that constitutional standards required that not only one House but both Houses of a bi-cameral legislature be related to population. This argument is based upon the following premise: that in the state of Michigan the House of Representatives has long been based on population and only the Senate is apportioned by districts; when an attack was made by Michigan citizens to cause the Court to find a deprivation of the plaintiff's constitutional rights by reason of the disparity in voting strength in the senatorial districts, the Michigan Supreme Court dismissed the suit; thereafter a reversal by the United States Supreme Court, it was claimed, amounted to a determination by the Supreme Court that a cause of action was stated in the state court which required a reversal of the action of the state court. There is some basis for plaintiffs' argument in this direction, especially when we consider that in Mr. Justice Douglas' dissenting opinion in the United States Supreme Court's decision in MacDougall v. Green, he and his colleagues, Justices Black and Murphy, seem to have said that the mere fact that the Federal Constitution itself sanctions inequalities because of the structure of the United States Senate, is no justification for a state also to create inequali-

ties by having similar differences. See dissenting opinion, Mr. Justice Douglas, *MacDougall* v. *Green*, 335 U. S. 281, at page 287, 289. However that may be, we do not find any authoritative decision by the Supreme Court that causes us [fol. 82] to require that in order to give the plaintiff his constitutional rights the state legislature must be constituted of two Houses, both of which are elected according to population.

We are here dealing with minimal standards only but a state, so long as it maintains the republican form of government that is guaranteed by the constitution, may greatly exceed these minimal standards.

As indicated in the discussion below touching on the relief to be granted, it is not necessary for us at this time to make a final determination on the question whether, if one House of the General Assembly of Georgia is elected according to population, the other House may remain as completely unrelated to population ratios as it is today. Some guidance as to our views on this matter may be furnished by other courts which now have before them somewhat similar problems. For instance, there is now pending in the United States Court for the Middle District of Alabama a suit by residents of Jefferson County (Birmingham) seeking to cause the Legislature of Alabama to be reapportioned in both Houses according to population. This is the case of M. O. Sims, et al, v. Bettye Frink, Secretary of State, et al, Civil Action No. 1744-N. We recognize that the state of Alabama has a constitutional requirement which provides that both Houses of its Legislature are to be "based upon population." Nevertheless the Federal Court will not require the state of Alabama to adopt any higher standard to guarantee equal protection of the laws than is required by the Fourteenth Amendment. In other words, we do not understand that the District Court in that case will require compliance with the Alabama constitution as to both Houses unless this is found by that Court to be required also by the Federal Constitution. Further proceedings in that case have been postponed until July 16th in order, as the Court said, to permit the Alabama Legislature to take such action as it is advised will bring it within the requirements of the Federal Constitution. The Court, how-

ever, has entered an order stating that in the event the Alabama Legislature does not act, "or if its action does not meet constitutional standards; then we will be under a clear duty to take some action in time to take effect before the General election of November, 1962." The Court said also, [fol. 83] "Such action, however, should be held to the minimum that is necessary for the citizens of Alabama to be accorded their constitutional rights."

The Remedy

Beyond urging the Court to dismiss the complaint in its entirety, thus to grant no relief, the defendants, other than the Ordinary of DeKalb County, have afforded us no aid in the difficult task of determining what relief, other than the declaration of the plaintiffs' rights, should be afforded the plaintiffs at this time. We have nevertheless, as is our duty, undertaken to consider all of the relevant factors bearing upon the propriety of granting immediate injunctive relief. The plaintiffs, on the other hand, have not insisted in their argument that the Court immediately grant an injunction. They do, however, insist that the Court take such affirmative action as will make it impossible for the Legislature that is to be elected in the General election on November 6, 1962, to perpetuate the unconstitutional discrimination. Some of the factors which we have considered are the time which now remains before the General election, the time necessary for any party which desires to do so to hold Primary elections for Representatives or Senators, or both.[6] We have also considered the fact that there is now being conducted a vigorous race for nomination for Governor at the September 12th Democratic Primary; we have also considered that there would still be time after the September 12th Primary, if it was deemed desirable, for

[6] Although there is now scheduled a party Primary for the Democratic Party for September 12, 1962, and some of the Representatives and Senators are now doubtless planning to run for nomination in the Democratic Primary to be held on that same date, there is nothing in the law that requires Primaries for election of Representatives or Senators to be held on this or any other particular date.

the Governor to call a special session of the Legislature, and time to give effect to any changes in the laws that might be enacted at such special session, including the promulgation and advertising of a proposed constitutional amendment to be passed upon by the voters at the November 6th General election if the Legislature should be so advised, and such special elections as might be necessary to a reconstituted General Assembly, if it is in fact reconstituted.

[fol. 84] Giving full consideration to all of these factors, and recognizing the right of the plaintiffs to have their constitutional rights vindicated at the earliest practicable moment, while at the same time according every presumption of good faith to, and affording a reasonable opportunity to act to, the responsible State officials and the present General Assembly now that the rights of the parties have been declared, we have concluded that we should enter no injunction at this time. We have concluded that we should postpone any further proceedings in this matter until the State has had a reasonable opportunity to reconstitute the Legislature so as to meet the constitutional standards here laid down prior to the January, 1963, session. If it appears that the Legislature has taken such action as brings the composition of the General Assembly within such constitutional standards, then this Court need take no further action. If, on the other hand, the Legislature does not act, or if its action does not meet constitutional standards, then we will be under a clear duty to take such action as is necessary and feasible to accord plaintiffs their rights.

The Court retains jurisdiction of the cause for the entry of such other and further orders as may be required.

This 25th day of May, 1962.

Elbert P. Tuttle, Chief Judge, United States Court of Appeals, Fifth Circuit.

Griffin B. Bell, United States Circuit Judge, Fifth Circuit.

Lewis R. Morgan, United States District Judge, Northern District of Georgia.

[fol. 85] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 7883

HENRY J. TOOMBS, et al., Plaintiffs,

—versus—

BEN W. FORTSON, JR., as Secretary of State of Georgia, et al., Defendants.

ORDER—July 13, 1962

In our opinion and order in this case dated the 25th day of May, 1962, we determined and held that the provisions of Sections 47-102 and 47-102.1, of the Georgia Annotated Code, requiring rotation of the right to be represented in the Georgia Senate among the counties of the several senatorial districts are unconstitutional and void.

It now being called to our attention that Sections 34-3219, 34-3220, 34-3221 and 34-3222, of the Georgia Annotated Code, contain provisions requiring rotation in the nomination of candidates among the counties constituting senatorial districts, and that these sections are inseparably associated with the Sections of the Code heretofore found by us to be invalid, we now determine and hold that the said sections, to-wit, Sections 34-3219 through 34-3222, so far as they provide for the selection of candidates for the office of State Senator on a basis of rotation are unconstitutional and void.

The motion of the plaintiffs for the appointment of a Special Master is hereby denied.

The motion of the plaintiffs for a ruling as to the adequacy of the parties defendant is not now passed upon, the [fol. 86] Court retaining jurisdiction of the cause for all

further rulings and for the entry of such other and further orders as may be required.

This 13th day of July, 1962.

Elbert P. Tuttle, United States Circuit Judge.

Griffin B. Bell, United States Circuit Judge.

Lewis R. Morgan, United States District Judge.

[fol. 87] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 7883

HENRY J. TOOMBS, et al., Plaintiffs,

v.

BEN W. FORTSON, JR., as Secretary of State of Georgia, et al., Defendants.

OPINION—September 5, 1962

Before TUTTLE and BELL, Circuit Judges, and MORGAN, District Judge.

This Court, in its May 25, 1962, opinion, said:

> "Granting the plaintiffs' petition for declaratory judgment, we determine and hold that so long as the Legislature of the state of Georgia does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements."

We also said:

> "We also determine and hold that the provisions of Sections 47-102 and 102.1, of the Georgia Annotated Code, requiring rotation of Senate seats among the counties of the several senatorial districts is unconstitutional and void."

Subsequently, on July 13th, we stated:

> "We now determine and hold that the said Sections, to-wit, Sections 34-3219 through 34-3222, so far as they provide for the selection of candidates for the office of State Senator on a basis of rotation are unconstitutional and void."

With respect to the appropriate remedy for unconstitutional status of the State Legislature, we said in our May 25th opinion:

> "We have concluded that we should postpone any further proceedings in this matter until the State has had a reasonable opportunity to reconstitute the Legislature so as to meet the constitutional standards here laid down prior to the January, 1963, session. If it ap- [fol. 88] pears that the Legislature has taken such action as brings the composition of the General Assembly within such constitutional standards, then this Court need take no further action. If, on the other hand, the Legislature does not act, or if its action does not meet constitutional standards, then we will be under a clear duty to take such action as is necessary and feasible to accord plaintiffs their rights."

The motion now before us for consideration requests two things: It seeks some kind of order clarifying the status of an aspirant for the Democratic party's nomination to the Senate from the 34th Senatorial District, consisting of DeKalb, Rockdale and Gwinnett Counties, who has "qualified" by paying his registration fee with the Secretary of the DeKalb County Democratic Executive Committee, but not with the Executive Committees of the other two counties, in face of a "qualification" by a potential opponent who has paid his fee to the county Committee of Gwinnett County, which county would be "entitled" to nominate the Senator for the District under the now invalidated rotation statutes above.

The second request is that more exact guide lines be laid down by the Court as to what requirements it will enforce applicable to the composition of the 1963 session of the

General Assembly of the State. More specifically, it asks the Court to study the majority and minority reports made by the House Reapportionment Study Committee, and state whether either or both of the proposals contained therein would satisfy this Court's concept of "constitutional standards," and also whether the dates specified in the proposals satisfy this Court's concept of "the earliest practicable" moment within which the plaintiffs are entitled to have their rights vindicated.

Because we conclude that an answer to the second request practically moots the first question, we deal first with the request for further guidelines.

We have said that a Legislature elected as it has been in the past to hold office next January, would deprive the plaintiffs and their class of citizens, of constitutional rights. [fol. 89] We have already pinpointed the basis of such illegality—(1) the absence of at least one chamber being representative of the people on the basis of population, and (2) the selection of Senators by a process that restricted the choice to one of three counties by rotation in each senatorial district.[1] We have also said that there was time enough following the opinion of May 25th for these two defects to be cured.

We repeated this comment in the two brief opinions published by the members of this Court on July 18th. We said then:

> "It was our judgment, after mature consideration, that the period of almost seven months between our decision and the January, 1963, session was a reasonable period of time for accomplishing the accommodation. This is still our judgment."

We again reiterate that relief from the present invidious discrimination between citizens of the State in their representation in the General Assembly must be made effective coincident with the convening of the next session of the General Assembly.

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[1] There are exceptions in Fulton County, which has one Senator, and Chatham County, which is combined with only a single additional county.

We turn next to the nature of the relief to be granted. As we have previously stated, this is a matter that is within the power of the State Legislature. We are confident that they will properly exercise this power. At the present time, the only proposals that have been brought to our attention bearing the stamp of approval of any group having any official State standing are the majority and minority reports of the Legislative Reapportionment Committee. Fifteen members of the Committee participated in these reports, nine members, including the Chairman, Representative Joe Underwood, signed the majority report; four members, including the Vice-chairman, Judge M. G. Hicks, signed the minority report, and two members signed a separate minority report.

[fol. 90] Before commenting on the reports, it is helpful to note here that under the Georgia Constitution the Legislature has the power to rearrange the Senatorial districts so long as no more than fifty-four districts are created out of Georgia's 159 counties. The Constitution also provides that there shall be one Senator from each District. It is also to be noted that the Legislature does not have the power under the Georgia Constitution to change the composition of the House of Representatives. Thus, it seems plain that the only way permissible under the Georgia Constitution that a special session of the Legislature can remedy the defect heretofore found to exist is by re-districting the State in order to provide proportionate representation in the State Senate.

The minority report (as we will hereinafter refer to the four-member report) calls for a special session of the Legislature to re-district the State in such manner as to provide 54 Senatorial Districts reasonably apportioned to population. The Districts would vary in population from a low of 57,937 for each of the two Districts assigned to Cobb County, to a high of 85,594 for each of the three Districts in DeKalb County. Each Fulton County District, [fol. 91] seven in number, would have 79,474 population; Muscogee's two would have 79,311 each; Chatham County would have three Districts of 62,766 each, and Richmond would have two Districts, each having a population of 67,800. All of the other Districts in the State would fall

within extremes of approximately 69,000 on the low side, to 76,000 on the high side.

The minority report also recommends that the new Senatorial Districts be created in time for the election of Senators at the November 6th General Election. Presumably, this recommendation contemplates the nomination of Senators from their respective Districts and their election by the voters of their respective Districts as has always been the practice, and not an election of all 54 Senators by all of the voters of the State.

From what has already been said, it is clear that if the Georgia Legislature should adopt this proposal and make it effective for the next session of the General Assembly, it would fully satisfy the requirements which we have already set down. Moreover, of course, if the Legislature should change District lines to make different groupings of counties, this would be equally acceptable, provided the resulting disparities in population between Districts were no more significant than those outlined in the minority report. Thus, we state categorically that legislation embodying and implementing the minority report would furnish adequate interim or permanent relief.

We now turn to the majority report. It recommends no change in Senatorial Districts for the 1962 elections. It proposes a Constitutional amendment providing for a House of Representatives consisting of one Representative for each of the 159 counties, and a Senate of not more than 100 Senators "elected from Districts of approximately equal population." These changes, if adopted by the people, would not become effective until the elections of 1964.

As an interim measure, possibly to validate the election in Primaries already held or to be held on September 12th of Senatorial candidates under the now condemned rota-
[fol. 92] tion plan, the majority report would simply permit the party officials of either of the parties represented in the 1960 Presidential Election to certify the candidates of the party from the old Senatorial Districts. These candidates would then be voted on by the voters of the state at large at the General Election.

First, as to the proposed Constitutional Amendment, which is directed to permanent relief, we conclude that a Legislature established by Constitutional amendment hav-

ing a Senate apportioned to population would satisfy the standards of the Fourteenth Amendment to the Federal Constitution, whether it had 54 or 100 Senators, so long as the composition of the House of Representatives is not so unrepresentative as to cause the entire legislature to depart from the pattern set by the United States Congress. Whatever comports with the national legislative standard, assuming rationality and absence of arbitrariness in end result, can hardly be termed invidious. Cf. discussion in *Sanders* v. *Gray*, N.D. Ga., 1962, 203 F. Supp. 158, 169, of the federal electoral college system as a standard in determining the legality of the Georgia County Unit System. The national system of one body of the legislative branch being based on population and one on geography has withstood the test of time. It is fundamental in a government founded and maintained on a deliberate system of checks and balances. It protects the minority from the excesses of the majority, and is one of the principal reasons for a bicameral as distinguished from a unicameral legislature. A majority of the United States Senate is elected by approximately seventeen percent of the population of the United States, and this is not substantially out of line with the majority plan where approximately fifteen percent of the population of Georgia would elect the majority of the Georgia House. Of course, it may be argued that the extreme disparity between the largest and smallest counties [fol. 93] in Georgia would violate the national standard but we are unaware of any authority that requires a ruling that a legislature so constituted would violate the plaintiffs' constitutional rights. We therefore rule that the proposed constitutional amendment contained in the majority report, if proposed by the legislature and ratified by the people at an election, would satisfy the standard heretofore announced.

We do conclude that the interim plan proposed by the majority report is inadequate. To the extent that Legislators are deemed to represent the people of their counties or districts—and that is really the basis of this litigation; that is really what it is all about—no progress will have been made if State committees can merely nominate a slate of 54 Senators chosen from the present *unrepresentative*

districts, but elected by the entire electorate of the State. This, of course, would perpetuate the unequal representation, for the smallest District would still have one Senator and the largest would still have one, a disparity of 42 to 1. [fol. 94] The fact that they were elected at large would not alter this fact. Moreover, the essence of representation is the choosing of the representative by those he represents. Nor would a plan, although not suggested, envisioning state-at-large nominations coupled with state-at-large elections suffice. Such a plan would be a striking departure from representative government as we have known it due to the absense of senatorial districts. The remedy of no senatorial districts might be said to be worse than the present system under which there is at least a vestige of representation. Of course, it goes without saying that the General Assembly is empowered, as the majority report proposes, to permit candidates for the Senate to be chosen by primary or through rules established by political party. It may also modify the present requirements as to the nomination of candidates by petition, all to the end of providing for meaningful elections.

The Court does not attempt to resolve the problem now facing the candidates for party nomination in DeKalb County. They are essentially in the same position as are the candidates in every other county and present Senatorial District in the State. Furthermore, this is a state election matter with an adequate means for resolving the issue being provided under state law.

Any law affecting the composition of the Legislature of 1963 that substantially conforms to these provisions will fully satisfy the requirements of this Court for interim relief. Failure of the Legislature to enact such a law will impose a clear duty on this Court to fashion and give effect to a plan eliminating the present invidious discrimination coincident with the convening of the 1963 General Assembly.

This matter is set for further hearing at 10:00 o'clock a.m., Friday, October 5, 1962.

This 5th day of September, 1962.

Griffin B. Bell, United States Circuit Judge.

Lewis R. Morgan, United States District Judge.

[fol. 95] TUTTLE, Circuit Judge, Concurring in part and Dissenting in part:

I concur fully with all that is said in the opinion with the exception of the approval by my colleagues of that part of the majority report of the Legislative Reapportionment Committee proposing a constitutional amendment creating a House of Representatives of 159 members, or one member from each county. I am of the firm conviction that a State Legislature, even if it included one House fairly apportioned to population, would violate Fourteenth Amendment standards if it included a second chamber whose members were elected from geographical areas so completely disproportionate in population as would result from the proposed constitutional amendment.

Recent rulings of the Supreme Court of the United States, I think, reject the view that so long as one house of a bi-cameral legislature is apportioned to population, the other house can be as unrepresentative of population as 300 to one, or any figure approaching that great a disparity. See Scholle v. Hare, 369 U.S. 429 and N.M.C.A., Inc. v. Simon, 370 U.S. 190. See also dissenting opinion of Mr. Justice Douglas in MacDougall v. Green, 335 U.S. 781 at pages 287 and 289.

I therefore respectfully dissent from that part of the opinion which holds that a General Assembly having one house comprised of one representative from each county would satisfy constitutional requirements.

Elbert P. Tuttle, United States Circuit Judge.

[fol. 96] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 7883

[Title omitted]

DEFENDANTS', OTHER THAN MRS. KATHERINE MANN, AMENDMENT OF ANSWER AND ORDER THEREON—Filed October 13, 1962

Now come the defendants named in the above entitled cause, except the defendant, Mrs. Katherine Mann, Ordinary of DeKalb County, and amend their answer heretofore filed as follows:

1.

These defendants show that on the 5th day of October, 1962, the Honorable S. Ernest Vandiver, Governor of Georgia, approved Senate Bill No. 1 of the October Extra Session 1962 of the General Assembly, the same being Act No. 1 of said Extra Session, which said Act provided for the reapportionment of the State senate and for other purposes.

2.

These defendants show further that on the 8th day of October 1962, the Honorable S. Ernest Vandiver, Governor of Georgia, approved Senate resolution No. 4 of the October Extra Session 1962, which said Senate resolution No. 4 provided for submission to the people of Georgia for ratification or rejection an amendment to the Constitution of Georgia providing for the reapportionment of the State Senate and ratifying and confirming the provisions of the Act referred to in the foregoing paragraph of this amendment.

3.

These defendants say that the Court will take judicial notice of the aforesaid actions by the General Assembly of Georgia and by the Governor of Georgia and that these defendants at the adjourned hearing of the above entitled cause on October 13, 1962 will submit to the Court properly authenticated copy of said Act and of said resolution.

[fol. 97] Wherefore, these defendants pray that this amendment be allowed and ordered filed.

Eugene Cook, Attorney General of Georgia; Freeman Leverett, Deputy Attorney General of Georgia; Lamar Sizemore, Deputy Attorney General of Georgia; B. D. Murphy, Deputy Attorney General of Georgia, Attorneys for Defendants Other Than Mrs. Katherine Mann.

The foregoing amendment is allowed and ordered filed. This 13th day of October, 1962.

Elbert P. Tuttle, United States Judge.

[File endorsement omitted]

[fol. 98] Certificate of service (omitted in printing).

[fol. 99] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 7883

HENRY J. TOOMBS, et al.,

vs.

BEN W. FORTSON, JR., et al.

OPINION—October 19, 1962

Before Tuttle and Bell, Circuit Judges, and Morgan, District Judge.

Per Curiam.

On April 4, 1962, Henry J. Toombs and others brought a civil action in this Court against Ben W. Fortson, Jr., Secretary of State, State of Georgia, and other election officials, seeking to reapportion both the House of Representatives and the Georgia State Senate. The thrust of the plaintiffs' attack was that the Georgia constitutional and statutory provisions comprised a scheme of apportionment in both the House of Representatives and the Georgia Senate which did not accord to plaintiffs and other voters in Fulton County and other large urban areas fair and equal representation in either of the Houses of the General Assembly of Georgia.

This Court held, on May 25, 1962, that the legislative system as constituted violated the plaintiffs' right to equal protection of the laws as guaranteed them by the Fourteenth Amendment to the Constitution of the United States, and that it was necessary that one branch of the General Assembly of Georgia be reconstituted so as to meet constitutional standards prior to the January, 1963, Session.

This Court also held that the various provisions of the Georgia laws requiring rotation of the right to be represented in the Georgia Senate among the counties of the several senatorial districts were unconstitutional and void. [fol. 100] Supplementary orders of clarification were issued by this Court on July 13, 1962, and September 5, 1962, clarifying and setting forth more exact guide lines as to the requirements for the composition of the 1963 Session of the General Assembly of Georgia.

In the order of this Court filed on September 5, 1962, the Court was concerned with two proposed plans being considered by a constituted committee of the General Assembly of Georgia. One of these reports was known as the Majority Plan of such committee, and the other report was known as the Minority Plan. This Court stated categorically that legislation embodying and implementing the Minority Report would furnish adequate interim or permanent relief.

Thereafter, on October 5, 1962, the General Assembly of Georgia passed, and the Governor of Georgia approved, Senate Bill No. 1 which, in effect, adopted a plan similar to the Minority Plan presented to and approved by this Court, except for a provision contained in Section 9 of Senate Bill 1 which provided the method of electing Senators in multi-district counties. This provision is as follows:

> Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of said county in which such Senatorial District is located.

On October 8, 1962, Franklin Anderson, a resident of DeKalb County, Georgia, a multi-district county comprising Senatorial Districts Nos. 41, 42, and 43, filed a petition seeking to intervene in the pending reapportionment case, setting up that the above-quoted paragraph from Section 9 of Senate Bill 1 was discriminatory and void for the reason that it requires persons seeking Senatorial [fol. 101] office in any Senatorial District which does not include a full county to run for office in districts other than

the district which he seeks to represent, and which permits voters to vote on such candidate who may not be a resident of the district of the voter, alleging that, in effect, such provision in Senate Bill 1 violates various provisions of the Constitution of the United States.

On October 12, 1962, Roy Charles Bell, a citizen and registered voter in Fulton County, Georgia, sought to intervene on substantially the same grounds as set out by petitioner Franklin Anderson of DeKalb County, Georgia.

On October 9, 1962, one of the defendants in the original litigation, Katherine E. Mann, Ordinary of DeKalb County, Georgia, filed a motion to dismiss upon the grounds that the General Assembly, having reapportioned the State Senate by redistricting it according to population through the enactment of Senate Bill 1, rendered the question now moot.

This Court is of the opinion that the provisions of Section 9 of Senate Bill 1 providing for the election of Senators by county-wide voting in multi-district counties presents serious questions as to whether it is violative of the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and at this time the Court expressly does not rule on the validity of this provision.

This Court, on October 13, 1962, by oral order, refused to restrain and enjoin certain of the respondents from conducting the Primary Election for the Senators in the multi-district counties according to the provisions of Sen-[fol. 102] ate Bill 1, reserving in said oral order its opinion as to the validity of conducting the General Election according to the provisions of Senate Bill 1.

While the Court has expressed doubt as to the validity of county-wide voting as set out in Senate Bill 1, even assuming the invalidity thereof, relief could be had at this late stage only at the grave risk of disrupting completely the elective process which is to be employed in the General Election on November 6, 1962.

The purpose of this proceeding was to accord equitable relief to voters in this state who were denied fair representation in the General Assembly of Georgia, and the General Assembly of Georgia having granted that relief, this Court is of the opinion that the elective process of

the state should not be enjoined at this late date and, in the exercise of its equity powers, will not restrain and enjoin the election of Senators in the General Election conducted under the provisions of Senate Bill 1 in multi-district counties as sought.

The question of the Democratic Party's method of nominations in Fulton County, whether district or county-wide, is presently pending in the State Court (Case No. A-96441, Fulton Superior Court) and we make no ruling as to which system is to be given effect, so long as candidates are certified for the General Election under one plan or the other. Our interest lies in preventing the frustration of our order requiring reapportionment to the end that a reapportioned General Assembly may convene in January, 1963.

[fol. 103] Rule 24(b) of the Federal Rules of Civil Procedure provides that the Court, in the exercise of its discretion, may consider whether an intervention will unduly delay or prejudice the adjudication of the rights of the original parties. In the opinion of this Court, to permit the interventions would prejudice the adjudication of the rights of the original parties and, for this reason, the applications for intervention are denied.

The election and qualification of members of the Georgia Senate according to the plan of reapportionment having not been effectuated, this Court retains jurisdiction of the matter until such time as the Georgia Senate is reconstituted according to the previous orders of this Court.

The motion to dismiss is denied.

This the 19th day of October, 1962.

Elbert P. Tuttle, Chief Judge, United States Court of Appeals, Fifth Circuit;

Griffin B. Bell, Judge, United States Court of Appeals, Fifth Circuit;

Lewis R. Morgan, Judge, United States District Court, Northern District of Georgia.

[fol. 104] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 7883

[Title omitted]

PLAINTIFFS' MOTION FOR FURTHER CONSIDERATION AND ADDITIONAL RELIEF—Filed June 17, 1964

Plaintiffs respectfully move this Court for further consideration and additional relief and as grounds therefor respectfully show that:

1. The above-styled action is presently pending before this Court.

2. Plaintiffs filed this action on April 4, 1962 seeking the aid of the Court in reapportioning both chambers of the General Assembly of Georgia so that they will not continue to be denied their right to the equal protection of the law as provided in the Fourteenth Amendment to the Constitution of the United States.

3. On May 25, 1962 this Court rendered a declaratory judgment (205 F. Supp. 248) in which it determined and held, at page 257[5], "that so long as the Legislature of the State of Georgia does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements."

4. Following the entry of that declaratory judgment the [fol. 105] Georgia Senate was reapportioned and reconstituted pursuant to Georgia Laws of September-October 1962, Extraordinary Session, page 7, approved October 8, 1962 (Code Sections 34-1904, 34-1914 and 47-102 Amended).

5. In its opinion of May 25, 1962 this Court said, page 256[4],

"Viewing the extreme disparities existing in both Houses of the Legislature, against the background of

the several factors which we have taken into consideration, we are forced to the conclusion that the present composition of the Georgia Legislature amounts to invidious discrimination against the plaintiffs and all others who are residents of the counties in which plaintiffs reside."

6. The Court further stated in that opinion, at page 257[6]:

"... we do not find any authoritative decision by the Supreme Court that causes us to require that in order to give the plaintiff his constitutional rights the State Legislature must be constituted of two Houses, both of which are elected according to population."

"... it is not necessary for us at this time to make a final determination on the question whether, if one House of the General Assembly of Georgia is elected according to population, the other House may remain as completely unrelated to population ratios as it is today."

7. At the end of its opinion and order of May 25, 1962 (page 259) this Court retained jurisdiction of the cause for entry of such other and further orders as might be required.

8. Although various proceedings incidental to the relief sought by plaintiffs have been held in this action since the entry of the original declaratory judgment and order of May 25, 1962, no final decision or order has been rendered on the constitutional rights of plaintiffs to have the second [fol. 106] House of the Georgia General Assembly reapportioned as nearly as practicable in relation to population.

9. On June 15, 1964 the Supreme Court, in *Reynolds* v. *Sims* and five other cases, originating in Alabama, New York, Maryland, Virginia, Delaware and Colorado, held that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of bicameral state legislatures must be apportioned on a pop-

ulation basis." The Court said further that "the Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."

10. In view of the constitutional standards enunciated by the Supreme Court on June 15, 1964 and the invidious discrimination against plaintiffs in the apportionment of the Georgia House of Representatives, as alleged in paragraphs XXV through XXXI of their complaint and as found in said opinion of May 25, 1962 (supra, pages 250-251), plaintiffs are entitled to further consideration and relief from this Court in respect to the apportionment of that House of the Georgia Legislature.

11. The General Assembly of Georgia is presently in extraordinary session for the purpose of considering and enacting laws for revision of the State election code and for proposing to the voters of the State a revised constitution for ratification at the general election to be held on November 3, 1964.

12. The next general election for members of the General Assembly of Georgia will be held on November 3, 1964, and the next State primary election for members of said [fol. 107] General Assembly will be held on September 9, 1964. Except for a limited number of members who have been nominated in Democratic Party county primary elections, the members of said General Assembly will be chosen sufficiently far in the future for the General Assembly presently in extraordinary session or in another extraordinary session that can be called before said general election, to consider and enact laws that will enable plaintiffs for the first time to receive their constitutional rights.

13. As far as plaintiffs can determine, no Republican nominees for the House of Representatives of the forthcoming General Assembly have been nominated.

14. Further, many of those purportedly nominated by the Democratic Party as candidates for election to said House are persons who simply had no filed opponent as

of the time of the early cut-off date for candidate filing set by the Democratic Party officials, but which unopposed persons otherwise are scheduled to appear on the Democratic Primary election ballot in September 1964.

15. That said cut-off date for qualification of candidates was set unreasonably far in advance of the September 1964 regular Democratic primary.

16. That there are no statewide races for Governor, U. S. Senator, or statehouse officials in 1964, and now is a propitious time for plaintiffs' constitutional rights to be afforded when the atmosphere will not be as politically charged as it normally is by such statewide races.

17. That to delay the granting of effective relief to plaintiffs prior to the elections for the forthcoming Gen- [fol. 108] eral Assembly will result in continuing denial of plaintiffs' constitutional rights for two and one-half years during which a malapportioned House of Representatives will exert veto and control over the legislative affairs of the people of the State of Georgia with resulting irreparable damage to plaintiffs and others similarly situated.

18. That the facts of the present case present an unusual situation calling for provisional or permanent relief in advance of the constitution of the General Assembly in January 1965, rather than an unusual situation calling for delay.

Wherefore, plaintiffs pray that this Court will:

(a) Set the action for hearing on this motion at the earliest practicable date; and

(b) Grant plaintiffs the relief sought in its original complaint in respect to the Second House of the Georgia General Assembly and prior to the constitution of the House of Representatives for the 1965-1966 term of the General Assembly; and

(c) Grant plaintiffs such other and further relief as is meet and proper in the circumstances.

Francis Shackelford, An Attorney for Plaintiffs and Representative of the other Attorneys for Plaintiffs, viz., Hamilton Lokey, Joseph B. Cumming, Edward S. White, Israel Katz, William B. Gunter, A. R. Kenyon, Maurice N. Maloof, J. Quentin Davidson, Albert P. Reichert, John E. Simpson, Raymond M. Reed, John W. Sognier, Emmet J. Bondurant, 12th Floor, Citizens and Southern National Bank Bldg., Atlanta 3, Georgia.

[fol. 109] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action Number 7883

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON, and JOHN L. GLENN, Plaintiffs,

v.

BEN W. FORTSON, JR., Secretary of State, State of Georgia; EUGENE GUNBY, Ordinary of Fulton County, Georgia; KATHERINE E. MANN, Ordinary of DeKalb County, Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia; A. B. TOLLISON, Ordinary of Forsyth County, Georgia; ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia; JIM W. DICKERSON, Ordinary of Cherokee County, Georgia; GEORGE FINCH; JAMES P. WESBERRY, JR.; JAMES H. GRAY; GEORGE D. STEWART; NEILL LEACH; and SCHLEY THOMPSON, Defendants.

Transcript of Proceedings—June 19, 1964

Atlanta, Georgia

Before:

Honorable Elbert P. Tuttle, Chief Judge, Fifth Circuit Court of Appeals,

Honorable Griffin B. Bell, Judge, Fifth Circuit Court of Appeals,

Honorable Lewis R. Morgan, Judge, U. S. District Court, Northern District of Georgia.

[fol. 110] APPEARANCES FOR THE PLAINTIFFS:

Francis Shackelford, Hamilton Lokey, Edward S. White, Israel Katz, Joseph B. Cumming, William B. Gunter, A. E. Kenyon, Maurice M. Maloof, J. Quentin Davidson, Albert P. Reichert, John E. Simpson, Raymond M. Reed, John W. Segnier.

APPEARANCES FOR THE DEFENDANTS:

Eugene Cook, James M. Sibley, B. D. Murphy, E. Freeman Leverett, Robert Richardson, George P. Dillard, Governor Carl Sanders.

[fol. 112] (Atlanta, Georgia; Friday, June 19, 1964; in open court, 9:30 o'clock A.M.)

J. Tuttle: This Three-Judge District Court is in session this morning on motion of the plaintiffs seeking additional relief in connection with the case of Toombs and others against Fortson and others.

Are counsel ready to proceed in the matter? Mr. Shackelford?

Mr. Shackelford: If it please Your Honors, the Attorney General has requested permission for the Governor to speak briefly to the Court first in order that he may proceed to his other responsibilities, and that is entirely satisfactory with us.

J. Tuttle: First of all—

Mr. Cook: May it please the Court, may I—

J. Tuttle: Mr. Cook, we will state, of course, the request that the Governor be permitted to appear amicus curiae is granted. We are glad to have the Governor here. You would like to make the request now?

Mr. Cook: Yes, sir. I would like, if it please the Court, I would like at this time to urge the motion that I appear as amicus curiae on behalf of the Governor, and I move

also at this time the motion be granted, that he appear on his own behalf as amicus curiae, and if that motion is [fol. 113] granted I would like to ask that he speak out of order, if there is no objection of counsel, so he might leave and go back to the General Assembly.

J. Tuttle: Of course.

Mr. Cook: So I move the Court the granting of the motion.

J. Tuttle: There being no objection, we will be very happy to hear from the Governor first. Governor Sanders.

Statement by Governor Carl Sanders

Governor Carl Sanders: May it please the Court, I would like to begin by first expressing my appreciation for the privilege you have accorded me to appear as Governor of the State of Georgia to come before this honorable court this morning. It is my high honor to speak in behalf of those who are so vitally affected by the case at bar, the people of Georgia and the members of the General Assembly.

The historic significance of this hearing cannot be underestimated. The burden of its responsibility weighs heavily upon all. No citizen is exempt; each is involved. Indeed perhaps no meeting of any court in our State has ever been of greater import, of more farreaching application than this today. So vital is this hearing that I felt compelled in the interest of responsible and stable government to come before this court in order that I might express what I believe to be the views and the convictions of the majority of the citizens of our State.

I do not intend to make any legal argument, for what I [fol. 114] have to say is not directed to specific points of law. Rather, I am here to present to this honorable court several factors involving longstanding practice and immediate practicality.

I would like to say further that my remarks should not be construed in the least as a waiver of any legal defense or motion which might be presented by the Attorney General of Georgia or those who have been called upon to respond to this motion that has been filed. My purpose,

I reiterate, is to point up some of the practical aspects of the problem of immediate reapportionment of the House of Representatives of Georgia.

Truly, we are living in an age when we look down the long gunbarrel of history. The problems which now confront our State would seem to surmount the political mechanism for dealing with them. The decisions of the Supreme Court of the United States of last Monday, requiring State Legislatures to be apportioned entirely on the basis of population, were, in my judgment, a turning point in the history of this Nation. These decisions specifying one-person-one-vote in regard to legislative representation were a revolutionary departure from generations of established legislative practice.

I am not here today to question the wisdom of those landmark decisions, for they are now the law of the Land, [fol. 115] and dissident remarks by me or anyone else cannot change the decisions or their tremendous impact on our State.

As Governor and as one who has served in both houses of the General Assembly I do not believe that immediate and satisfactory reapportionment of the Georgia House of Representatives is either possible or practical without reasonable time for deliberate consideration by the members of the Legislature. It is my judgment that nearly two centuries of the legislative procedure and practice cannot be effectively replaced without careful study and a thorough consideration of the many-faceted problems and some exploration of the potential solutions involved.

We are faced, in short, with the difficulties which arise over population distribution, primaries, geography. I believe that consideration of these factors should be based on two premises. First, that reapportionment must be done on the basis of substantial population, set forth in the decision of Monday, and, second, who is to reapportion the House of Representatives? Should it be the federal court, or the people and their elected representatives?

Coming before this honorable court I do so as a representative of more than four million Georgians with the [fol. 116] knowledge that our State has certain sovereign rights. Among these is the well-established principle that

a State's problems should be solved by the State and its citizens. I need not remind this court that Georgians are responsible people who have demonstrated time and again their willingness and, indeed, their desire to live under a government of laws, not a government of men.

This court, I am sure, recalls that the General Assembly acted forthrightly and responsibly in September of 1962 in reapportioning our State Senate pursuant to a judgment of this same court. Again, in February of this year, the General Assembly, in prompt response to court decision, reapportioned our ten Congressional districts. Fortunately, the solution to this problem was made easier by the fact that it had been under study by Legislative committees for some months. Thus, it is manifest, when given the opportunity to act in a responsible way, the people of Georgia, through their elected representatives in the General Assembly, have always responded with deliberate speed and practical promptness.

I respectfully submit today that the people of Georgia, acting through their elected representatives, will respond with the same deliberate speed and the solution to the reapportionment of the House of Representatives if they are given the opportunity to do so.

[fol. 117] It cannot be done, however, in the flick of an eye but only after due consideration if it is going to be done constructively and in the best interest of all the citizens of this State. I, therefore, say to you that it is the position of our State government that adequate study of the existing population districts must be provided for, that further study of the geography and existing political subdivisions cannot be totally ignored in the establishment of new population districts, other than those now existing for the election of State Senators, are desirable and feasible.

It is also my belief that equity requires consideration must be given those nominees now numbering well over one-half of the total membership of the 205 members of the House of Representatives who already have won nomination in many hotly contested primary races this summer.

I would respectfully remind this Court that the Supreme Court of the United States has held that in democratic Georgia a primary nomination is tantamount to election,

and that the Chief Justice of the Supreme Court, in the opinion handed down this week, stressed fullest consideration should be given to the problem of reapportionment in those States where, and I quote, "The machinery of elections is already in progress."

[fol. 118] Another point that should be considered is the fact that already this year the members of the General Assembly have been in session and absent from their normal pursuits of livelihood for nearly four months. It is fundamental to our system of government that those dedicated public servants who represent us in the halls of the General Assembly not be salaried professionals. Because of the great demands placed upon them in public life and private business affairs this year I can state in unequivocal terms they are now weary of legislative debate. They rightfully long to return home to neglected private pursuits, and it is my judgment that they could not conscientiously remain in extraordinary session or convene again anytime in the immediate future to consider the question of legislative reapportionment without a loss in effectiveness and possibly without arriving at any workable solution.

I think I should also point out that there has already been approved a resolution authorizing the establishment of a House committee to study the problem of reapportionment, and this resolution can be implemented immediately. The significance of these points is simply this: If Georgia is to wisely and effectively reapportion the House of Representatives, it is my opinion that sufficient time and ample time need to be granted by the Court if we are to avoid [fol. 119] a disruptive and even chaotic conclusion which likely would result from undue haste.

Let us not create a Frankenstein monster by precipitous and hasty implementation of the decision of Monday.

No person, no agency, no public official knows better than you, the Judges of this Court, the ill effect that haste can have. The mantle of responsibility which has been placed upon your shoulders and ours is monumental. No public official in Georgia and no Court in this Land will, in conscience, envy you the difficult task of determining how and when reapportionment should and must be completed.

At the same time it is a responsibility shared by another agency of government, and that is the General Assembly of Georgia. We of State government do not take this task lightly. It cannot and will not be frivolously considered by the people or their elected representatives. If there is one truth that I would like to impress upon this Court today it is simply this: Deliberate action has been, is now, and ever will be the watchword of Georgia government and Georgia people.

The decisions of last Monday affecting six States of this Union, overturned nearly two hundred years of State legislative history. It is not reasonable, therefore, for me as [fol. 120] Governor, or is it not reasonable for me as Governor to ask those who now occupy positions of representation in our Assembly be given time to deliberate, to study, to analyze and to chart the course of our legislative history for possibly two additional centuries?

No one familiar with our legislative process may reasonably question the magnitude of the task which confronts those of us in this year of our Lord 1964. We recognize our responsibility to the law and to the people. The decisions and the decrees of the Court, including this tribunal, have been implemented and they shall continue to be implemented in Georgia by Georgians. We recognize the mandate of these momentous decisions. As law abiding citizens we shall respond. We have never, nor will we now shirk our duty.

We request only for an amount of relief which sufficient time will provide in executing the ruling and honoring the wisdom of this Court, but in so doing we do not believe that the General Assembly of Georgia should be forced to reapportion the House of Representatives under any compulsion of immediacy. Instead, the Chief Justice of the Supreme Court of the United States voiced a desire for a display of good faith on the parts of the several States involved, and I believe that the record will show that Georgia has already accepted publicly and has shown pub- [fol. 121] licly this good faith.

I would remind this Court just three days ago, less than twenty-four hours after the majority opinion was handed down by the Supreme Court of the United States, the Senate

of Georgia, sitting in extraordinary session, wrote into a proposed new Constitution language which provides specifically that both houses of the General Assembly shall be apportioned on the basis of substantial population.

Surely this coming just twenty-one months after Georgia similarly apportioned her Senate and only four months after the Assembly redistricted Georgia's ten Congressional districts is conclusive evidence of good faith.

In summation, I urge the Court to take cognizance of the newly included constitutional provisions establishing population only as a basis for both Senate and House apportionment.

I urge the Court to take cognizance of the fact that the machinery of election already is in motion in Georgia.

I urge the Court, therefore, to grant substantial and needed time for deliberate action by the General Assembly of Georgia in reapportioning the House of Representatives in order that we might best effect and execute the will of our people of our State with due speed but with careful [fol. 122] and deliberate action. The granting of sufficient time to properly determine for ourselves the best and the most feasible method and procedure for reapportioning is, in my judgment, both as Chief Executive and citizen, in the best interest of both the people and the State of Georgia.

As Governor I intend to ask the Speaker of the House of Representatives to implement forthwith the resolution providing for a committee charged with the responsibility of conducting an immediate and thorough study of the problem of reapportionment of the Georgia House of Representatives and to file its report at the earliest practicable time for affirmative action by the General Assembly. This report will form the basis of an administrative proposal of the reapportionment of our lower house in compliance with the mandate of the United States Supreme Court and the guidelines established by this Court.

I implore the Court to favorably consider this statement of position. The request I am making is reasonable and therefore, in my judgment, should be granted.

I ask simply and earnestly for an acceptance by the Court of this State's good faith. It is a trust we have never vio-

lated, and it will not be violated if we are given the opportunity to govern ourselves as we should be governed. [fol. 123] I want to thank the Court for permitting me to be heard this morning. I want to say, gentlemen of this Court, that I come not as one who stands a safe distance away from the problems and the battles that confront us in the matter of legislative apportionment. I come from the field; I come as one who is in the midst of these problems; and I come bringing what I think are practical reasons and a practical knowledge of what I know now exists in the legislative process of this State.

And I say, gentlemen of this Court, as I have said earlier, if the members of the General Assembly of Georgia are given sufficient time to do the job it will be done correctly, it will be done constructively. If they are not, then I say to you in all candor that it would be my feeling, then, that the Court itself might have to proceed in this field which I do not believe the Court would like to proceed in, and I respectfully ask that you consider these factors; I ask that you consider the good faith that has been evidenced by this General Assembly in the last twenty-one months; and I ask that you give us consideration, give us time to do the job that I know you know must be done.

And, if the Court, before I leave—again, let me thank you for allowing me to come over and appear and give [fol. 124] you this brief dissertation on what I think is a reasonable position. And if there are any questions by any member of the Court I would be more than happy to answer them at this time before I do leave.

J. Tuttle: Governor, you hear a good deal occasionally about judicial restraint. Sometimes courts are criticized for not exercising enough judicial restraint. I just want you to know that this Court is exercising judicial restraint in not asking you a lot of questions. I state that because, as I think is apparent to everyone, you are in a very unique position with respect to your responsibilities.

This Court, both the District Court and the members of the Court who are on the Court of Appeals for the Fifth Circuit, feel almost always that we get at the truth of the matter by questioning counsel very closely, and, in fact, occasionally debating with counsel over the bench.

We think it would be inappropriate to do that with you because you are, in a sense, a very real sense, a client involved here. Nevertheless, I think for whatever benefit you may have of it, in order to advise your lawyers, if you have some views in response to what I am about to say, speaking only for myself, since this is a three-Judge court and each of us is equal in his vote and in his decision, there is a [fol. 125] problem that is raised here that has not been touched on in your statement, and I am making it not to get a response, of course, from you, but to tell you what is on my mind, and that is, assuming delay for the purpose of reapportionment is indicated for the reasons you have stated, during the period of the delay the Legislature as now improperly and illegally constituted, as stated by the Supreme Court and as we all must now recognize to be the fact, is continuing to legislate on some of the most basic problems of our State, including the passage or the consideration of a new election law which will affect the future of the State in a matter unique in that the elections are the most important process of our democratic government, and, also, and I needn't remind you of this, the consideration of a new Constitution for the State of Georgia, the problem that sticks in my mind is, how can—how can the Court stand by and take no action with respect to that kind of basic legislative process by a Legislature that we must now all recognize does not meet constitutional standards?

That is a question I haven't resolved, certainly in my mind. It is a question that is implicit in all you have said, but hasn't been touched on by what you have said, and it may well be they are two separate problems, but I want you to know that is a problem that I am concerned with, and it may be helpful to you to know this is one issue that [fol. 126] is, I think, inherent in the case.

Governor Sanders: Your Honor pleases, I think the Attorney General, when he makes his legal argument, will touch upon this particular problem in detail and furnish the Court with the legal authority that the State is relying upon as we proceed with, as you pointed out, an attempt to complete the work that is under way insofar as this extraordinary session of the General Assembly.

J. Tuttle: Of course, we have to realize if a Constitution is proposed by this Legislature and is adopted by the people this fall, that cannot be amended thereafter except by a two-thirds vote of the members of the General Assembly.

Governor Sanders: That's correct.

J. Tuttle: It isn't a simple legislative action by a newly and properly constituted Legislature that can amend that kind of Constitution.

Governor Sanders: Correct. We also have to realize if the General Assembly were required to put into a new Constitution at this time by constitutional amendment and not by statutory enactment, that too would require a two-thirds vote of the General Assembly to accomplish that particular problem.

Any other questions? I will be glad to answer them.

J. Tuttle: I want to thank you for coming. We appreci- [fol. 127] ate it. We consider it not only a fine discharge of your obligation but we appreciate it.

Other members of the Court may want to ask questions.

J. Morgan: No, sir.

J. Bell: I don't have any questions.

J. Tuttle: Thank you.

Governor Sanders: Thank you, sir, very much.

J. Tuttle: You may proceed, Mr. Shackelford.

STATEMENT BY MR. SHACKELFORD

Mr. Shackelford: Your Honor—

Governor Sanders: If the Court will excuse me—

J. Tuttle: Yes, sir; yes, indeed.

Governor Sanders: —I would like to return to the Capitol.

J. Tuttle: Yes, sir.

Mr. Shackelford: If it please the Court—

J. Tuttle: I think we probably have taken sufficient evidence in the prior hearing so that with such matters as we take judicial notice of it is not necessary to introduce any further evidence. Is that the assumption on which you are proceeding?

Mr. Shackelford: That is the assumption on which we are proceeding, Your Honor.

J. Tuttle: All right, sir.

Mr. Shackelford: Fortunately, all the parties, including the State, feel that the decisions of the U. S. Supreme Court [fol. 128] last Monday must and will be implemented. That then leaves us only two questions: Who should do the job? and When?

The Governor has spoken eloquently today in urging the General Assembly do the job as it did two years ago in the case of the Senate. We very much desire and want the General Assembly to do the job.

J. Tuttle: We can lay that one at rest; we do too.

Mr. Shackelford: That leaves—

J. Tuttle: I think I speak for my colleagues too.

J. Bell: Yes.

Mr. Shackelford: That leaves, then, the question of timing, and on that vital question there is complete disagreement.

We feel that the House should be reapportioned either on a provisional basis or a permanent basis this year in time for the 1965 Session in January. We think that certain factors, very comparable to the situation of two years ago, are present today, and in this respect we have a chart which we think will serve easily and usefully to show us all that time schedule and to show how applicable and pertinent that situation is now, in our judgment, to the situation today.

J. Tuttle: Is this what occurred last time?

Mr. Shackelford: This is what occurred in 1962.

May 25th was the date of the first and major opinion [fol. 129] of this Court in the matter. The Court issued a supplemental opinion in July and then a supplemental opinion on September 5th. The reason for the supplemental opinion on September 5th, there had been some discussion in the General Assembly and among others as to whether the Court meant what the Senate should be, or one house of the General Assembly should be reapportioned by January of 1963. The Court in its September 5th opinion made that entirely clear.

On September 12th, that was the date of the State primaries.

On October the 5th, after that date of September the 12th, in other words, after the State primaries, the Legislature reapportioned the Senate and the bill was signed. That was the critical date then.

The next date we see there, October 16th, was the date of the special primaries. One week later—

J. Tuttle: Was that provided for by the act of the General Assembly?

Mr. Shackelford: That was provided for by the act of the General Assembly; yes. And the act of the General Assembly further provided that where run-offs were necessary they should be held as they were one week later on October the 23rd. The general elections, as we see, was on November the 6th.

[fol. 130] Now, we think there are certain factors this year that actually, from a time schedule standpoint, are more favorable than they were in 1962, and I will mention those factors. As a time element, of course, we are approximately three weeks later now than we were then, virtually the same amount of time. However, we have a General Assembly that is already in special Session. We know they have had a burdensome job, but nonetheless a general session in being.

J. Morgan: Aren't they limited in the call as to what they can consider?

Mr. Shackelford: They were, Your Honor, limited in the call, but the Governor by another proclamation, while they are in session, could expand that call without any problem whatever. He could do it—

J. Tuttle: You say, it is your opinion, at least, the Governor could now enlarge the function of the Special Session without any delay in the proceeding?

Mr. Shackelford: Without any delay; yes, sir. There are two ways of doing that, in our judgment. One would be to do it by enlarging this actual Special Session that we have. The other way of doing it would be by letting it terminate and reconvening immediately the following day, a further Special Session.

J. Tuttle: No time for notice is required?

[fol. 131] Mr. Shackelford: No time notices; no, sir.

The second factor we feel is more favorable this time than it was two years ago is the fact that we don't have any statewide elections this year. Last year—last time, 1962—

J. Bell: You say the Governor doesn't have to give a certain numbers of days notice before he can expand the call?

Mr. Shackelford: Judge Bell, I am sure he must have a certain number of days notice, and I am sure the Attorney General can advise us on that score. But if this particular Session could not be expanded, it is my judgment, in view of the indication—

J. Bell: He can call another one.

Mr. Shackelford: —the General assembly will be sitting next week, that this kind of notice could be given, for all practical purposes, in ample time.

J. Bell: Yes.

Mr. Shackelford: Two years ago, the second point which runs in our favor from the time schedule standpoint, is that there were general elections under way, statewide elections in our State, including a Governor's race. The Court took cognizance of that fact, and that was a consideration which allowed the Court to let the September primaries proceed so that the elections would be over before any Special Session might be called.

[fol. 132] But we don't have that factor this time, and, therefore, we can move before the September primaries. Last time the September primaries were invalid and thus we had the October 16th primaries.

J. Bell: You do have this unusual situation. You have filed this motion seeking relief before the Supreme Court decision is final, in a sense, in the sense that the litigants can ask for a rehearing—

Mr. Shackelford: Yes.

J. Bell: —and so that opinion is not even final, and you are wanting to convene the Georgia Legislature before the Supreme Court decision is even final. I mean, that is a little bit—may be an equity on the other side.

Mr. Shackelford: It is an equity on the other side.

J. Bell: A motion is unusual in that sense. Ordinarily people wait until the decision is final before they ask for relief.

Mr. Shackelford: It is unusual, and I think, Judge Bell, and I think the situation is unusual, and I think what this Court has before it, it does have the Supreme Court opinions, six in number.

J. Bell: We know what they are, and the six opinions very likely won't be changed.

Mr. Shackelford: And subject to motion for rehearing. But even without those opinions this Court, taking into ac- [fol. 133] count other decisions that have come down, such as Zimmerman in Michigan, and such as the Wisconsin case, this Court really on its own initiative and without the benefit of the Supreme Court could properly rule.

J. Tuttle: I think it is generally recognized the Supreme Court will adjourn for the term after next Monday's session, and I suppose if any motion for rehearing is filed this may well have been disposed of by next Monday. I don't know about that.

Mr. Shackelford: I would hope that is the case.

J. Tuttle: Yes.

Mr. Shackelford: I am not that familiar with their time schedule.

J. Bell: Probably won't have to file it until twenty days or some such time.

Mr. Shackelford: Mr. White just emphasized the point that in this group of six cases, the Alabama decision was an 8-1 decision, which is pertinent from the standpoint of the conviction of the Court in regard to results.

J. Bell: I realize there is very little likelihood—

Mr. Shackelford: Very little possibility.

J. Bell: —of the decisions being changed.

Mr. Shackelford: It is a pertinent point.

J. Bell: You are speaking of haste, I wanted to call your attention, that is haste on the other side.

[fol. 134] Mr. Shackelford: Yes.

Our third factor we feel that runs with us this time and runs with us very strongly is that now the General Assembly is experienced in this field of reapportionment. It has exercised its responsibilities in the case of the Senate, and, as a matter of fact, this resolution to which the Governor referred was actually passed last February in regard to a study of reapportionment of the House itself.

But they are experienced; they are knowledgeable on the score.

The final element which we indicate on this particular subject, and it is a vital subject, is that if it so shows, the Legislature could provisionally reapportion this year and give itself additional time in a later year to do so on a permanent basis. And that, of course, has been done from time to time either by the Court or by a State Legislature.

Now, the second thing which we think is very pertinent—

J. Bell: What have you got in mind when you say "provisional reapportionment"?

Mr. Shackelford: Well, what we mean by—an example of provisional reapportionment, for instance, would be taking the present senatorial districts and using a multiple in those districts insofar as the House is concerned, either a multi-[fol. 135] ple of two or a multiple of three, either using the district as a whole, or which would perhaps be much closer to the people, dividing a district into the number of subdivisions to correspond with your multiple. If the multiple were two, it would be divided into the two subdivisions. If the multiple were three, it would be divided into three subdivisions. That would be a provisional reapportionment which the State—the General Assembly could adopt and which it would understand, and still leave wide open the road in the future to ultimately adopt and enact a permanent plan.

Now, the second element of time that we feel is very important, very persuasive—

J. Bell: Wait a minute, now.

Mr. Shackelford: Excuse me.

J. Bell: The General Assembly couldn't do anything until we strike out of the Constitution the present provision governing reapportionment, could it?

Mr. Shackelford: That's right; Article III, Section III, Paragraphs 1 and 2.

J. Bell: Have you prayed that that be done?

Mr. Shackelford: We have pleaded that be done in our original position. It is in Paragraphs 25 and 31, and also in the relief Paragraphs which are E, F, and G.

Now, the second element which we feel is very pertinent, [fol. 136] and we have a chart for convenience to show that, and that is the Alabama situation of two years ago, and, of course, the case was just decided by the U. S. Supreme Court on Monday. In that instance, again in 1962, the first hearing of the Three-Judge Federal court was on April 16. Primaries—

J. Tuttle: At that time the Three-Judge Federal Court expressed the tentative opinion or view as to what had to be done.

Mr. Shackelford: Expressed their tentative views, kept the matter in its jurisdiction and gave the General Assembly or the Alabama Legislature an opportunity to enact reapportionment legislation.

J. Tuttle: But then the primary was held in usual course without any attention being paid to what the Court said.

Mr. Shackelford: Yes; in usual course in May.

Then on July the 12th the Legislature passed its own reapportionment bill. Actually there were two bills that it passed. If one wouldn't do it, they thought perhaps the other would do it.

J. Tuttle: Proposing a constitutional amendment and adopting a temporary measure.

Mr. Shackelford: Yes, sir.

Then on July the 16th there was a further hearing before the Three-Judge bench and five days later, on July 21, the decision was handed down by the Three-Judge [fol. 137] bench striking the reapportionment plan adopted by the State Legislature.

The Court, in turn, then provided its own provisional reapportionment plan. It was that provisional reapportionment plan which was before the U. S. Supreme Court, and in that respect the order was issued four days after the opinion on the 25th and the elections were held on November 6.

The very pertinent thing in Alabama was there was no primary, unlike the situation which is open for us here, and we must bear in mind that the Supreme Court commended the conduct of the Three-Judge court in Alabama very highly.

J. Tuttle: Except it didn't go far enough.

Mr. Shackelford: Yes. But it commended the handling of the matter on a schedule very highly from that standpoint.

J. Bell: You think that is worth a lot, to be commended?

Mr. Shackelford: I think any commendation, Judge Bell, is acceptable and welcomed.

J. Bell: You think more inferior judges or judges or inferior courts ought to try to get commendations?

Mr. Shackelford: No, sir. I think they ought to do justice, Judge Bell.

J. Bell: That's right.

Mr. Shackelford: And the pertinence of the commen-
[fol. 138] dation is that this was an action and a set of procedures which the Supreme Court approved, and that is pertinent insofar as justice—as the justice element of it is concerned.

On November the 6th the elections were held, and the striking thing in Alabama is that there were no primaries that were valid and that were used at all in 1962 because the primaries of May, 1962, had been struck down.

We are fortunate in this case to have fourteen attorneys. We did have fourteen attorneys—

J. Tuttle: Two of them have been excused.

Mr. Shackelford: One.

J. Tuttle: One on your side and one on the other side.

Mr. Shackelford: They have now become partners.

J. Tuttle: Yes.

J. Bell: You are in bad shape now. You just have thirteen; you have an unlucky number.

Mr. Shackelford: But we consider it a lucky number.

J. Tuttle: One of your attorneys has called your attention to something important?

Mr. Shackelford: Yes. Mr. White has just called my attention to this comment in the Court's opinion in regard to the Alabama case, that after the District Court's decision new primary elections were held pursuant to legislation enacted in 1962 at the same Special Session as the proposed constitutional amendment and Crawford-Webb Act
[fol. 139] to be effective in the event the Court itself ordered a particular reapportionment plan into immediate effect.

And those, in view of the reapportionment plan, Mr. White further emphasizes—this has been confirmed to us by the Attorney General's office in Alabama—were invalid primaries and were thus ineffective.

Therefore, we have the situation here which is different, and I think less favorable than we have with us here today, because we have an ample opportunity not for an October primary but for a September primary in normal course, September 9 in this instance, this year, and we feel that is a very pertinent point.

Now, there has been a good deal of comment and a good deal of discussion on early primaries that are allowed in the case of the House in our State.

J. Tuttle: Will you spell that out a little bit?

Mr. Shackelford: Yes, sir. We are again going to use, if we might, a chart, because we think it will be helpful to illustrate.

There have been 131 of these early primaries out of 205, and in the 131 there was no opposition—this is a point of refinement which Mr. White is emphasizing, and it is an important point of refinement, because it puts the situation into proper perspective, and that is of the early primaries. [fol. 140] There have been contests in only 51 instances, and contests are expected in three additional instances before the September 9th primary, but there have been contests in only 51 instances.

J. Tuttle: Before you get into the statistics of it, if a person offered in an early primary, as you speak of it, is he now the nominee of the Democratic Party to go on the General Election ballot, or does he still have to go on a ballot on September 9th of this year? Do you know the answer to that? Maybe Mr. White knows the answer to that.

Mr. Shackelford: Just speak to him, Ed.

J. Tuttle: You can participate.

STATEMENT BY MR. WHITE

Mr. White: Your Honor, it is my understanding that once he has won an early primary, that that is certified for the General Election ballot.

J. Tuttle: He does not again have to run in the September primary of the Democratic Party?

Mr. White: No, sir.

J. Morgan: He is certified after the conventions are held. I don't know how the Republicans hold their convention, but the Democrats would hold their convention in Macon, usually, and he would be certified, whether he was elected in the early primary, the primary when the sheriffs run, or whether it would be the September primary.

[fol. 141] Mr. White: That's right. It goes on the General Election ballot printed by the Ordinary.

J. Tuttle: He's done all he can do in the way of an election until the General Election comes on, and he will be unopposed there probably, and therefore he's in.

Mr. White: Yes, sir.

J. Tuttle: All right. I shouldn't assume there will be no opposition; there may well be opposition in the General Election. I didn't have the heart to stop the Governor when he said the Supreme Court said nomination in Georgia and the Democratic primary is tantamount to election. He should recall that was said about fifteen years ago.

J. Bell: I am going to interrupt you in a minute and get equal time.

Mr. Shackelford: Very good, Judge Bell.

J. Tuttle: He's already had it.

J. Bell: He said Governor Sanders has already preempted the time.

Mr. White: Mr. Lokey says he is Exhibit A on that.

STATEMENT BY MR. SHACKELFORD (Resumed)

Mr. Shackelford: I will drop down a little bit and take up—I am tying it into this 55, and, as I say, now we have had the 52 situations where there had been the early primaries with contests, and we expect three more to make a total of 55, and of the 52 so far nominated before June 19, we don't know which were opposed and which were not [fol. 142] opposed and we were not able to get any breakdown figure from either the Speaker's office or from the Secretary of the Executive Committee of the State Democratic Party. We do know that there will be new candi-

dates, which are seventeen in number, and it is indicated that there will be five unopposed.

You notice as we add these figures up, we get a total figure—opposition is indicated in 71 cases in the regular September primary. Those that will be unopposed, the figure, in the September primary are 79. We know the time for filing was May 2nd this year, and that date is beyond us.

At the bottom of the chart we show the Republican primary situation. None have been held and their cut-off time for filing is July the 24th.

J. Tuttle: Of course, they can still hold a convention—

Mr. Shackelford: Yes, sir.

J. Tuttle: —and nominate by convention.

Mr. Shackelford: Yes.

Your Honors, we feel that our own situation in the State of Georgia, our own experience two years ago, we feel that the experience in Alabama which is before us and which has been approved by the U. S. Supreme Court earlier this week, we feel that the advantages that we have now that we didn't have before, the absence of a statewide guber- [fol. 143] natorial election and election for other statewide officers, the experience we have gained in this field, the existence of a Special Session already under way at this time, we feel that all of these factors make the situation particularly propitious at this time.

To us the compelling thing in a matter of this nature may well be compared to a serious case of cancer. And if it is a case of cancer that requires surgery, there is not a waiting period of six months or three months or two months; there is an immediacy about it, and if it is not undertaken the general experience is that the cancer grows worse.

We feel here that we have in our House a cancerous situation because of this malapportionment. We feel that the best thing from the standpoint of the State and from the standpoint of the General Assembly is to get the job done, to do the necessary reapportionment.

It is difficult, we recognize. We are fully aware of the adjustments that have to be made. But we feel the making of those adjustments now and moving ahead with them

now not only gives important constitutional rights to citizens that are now underrepresented but also from the practical standpoint, in our judgment, it will serve the most useful purpose of our State.

Thank you very much, Your Honors.

J. Bell: Wait a minute.

[fol. 144] Mr. Shackelford: Yes, Judge Bell.

J. Bell: You haven't addressed yourself to the mechanics of reapportionment. You have talked a lot about the election. I think everybody will concede there is plenty of time to have elections.

Mr. Shackelford: Yes.

J. Bell: But the Governor says the Legislature has met a long time this year, and he seems to imply it would be difficult to get a reapportionment job done by the present General Assembly for the reasons he stated. Do you want to say anything about that?

Mr. Shackelford: Yes, Judge Bell, I would like—we would like to speak to it.

J. Bell: All right.

Mr. Shackelford: Yes. We feel in this regard that there are two possibilities that are open in regard to the General Assembly. One is, in effect, a continuation or a tacking on, as I have mentioned, of the present Special Session. If a breathing spell is needed from all standpoints, we feel that then the General Assembly could be convened, for example, a month from today, bearing in mind the 45-day requirement for a primary, a filing, or it could be convened more propitiously in the middle of August and the necessary changes for the 1964 primaries could be made in the 45-day requirement statute. We think that would [fol. 145] give the General Assembly, through this study committee which, by resolution, was set up last February, further additional time in which to consider the matter and to consider it without haste, to consider it carefully.

J. Bell: How would we go about getting that done? The only parties to this case are the Secretary of State and four Ordinaries. Now, we don't have the Governor or the Speaker of the House or the President of the Senate as parties. We would —would we just enjoin the holding of

these elections and hope that something else would happen?

Mr. Shackelford: It is our—it would be our recommendation, Your Honor, that you would first strike down the invalid portions of the Georgia Constitution that we have discussed.

J. Bell: And the statute?

Mr. Shackelford: And the statute; yes; where pertinent.

The second thing that would be done on this score would be, as you have in your provisional opinions so far, a statement that the General Assembly must be apportioned before the January '65 Session.

The third thing in regard to getting it done, we believe that appropriate injunction might well lie, in regard to mechanics, so that there would be jurisdiction of the proper parties that would enable this to be done.

[fol. 146] My own feeling on that score is that that would be followed out, that it would be complied with. And that raises, in turn, if the General Assembly itself should elect to do nothing at all, in other words, if the time period should come and go, then under those circumstances it would—

J. Bell: The Governor said in candor he didn't think the General Assembly, the present General Assembly would—he may not have said he didn't think they would do it, but he said we might have to do it.

Mr. Shackelford: Fortunately, I was glad—

J. Bell: I can't quote just exactly what he said, but it was quite an implication, I thought.

Mr. Shackelford: Quite an implication. But fortunately, I was glad to see the Governor qualify, at least to a degree, his statement by the word "probably", which I believe the record will show in that regard.

J. Bell: Yes.

Mr. Shackelford: And it is our feeling if it should not do so, and we very much urge and hope it will do so—

Mr. White has pointed out that in 1962 you used declaratory judgment. We have the same parties that existed then and pursuant to the declaratory judgment the Senate itself was reapportioned.

J. Bell: I was asking those questions, because whatever [fol. 147] a court does, it doesn't want to get in the position of having its orders frustrated.

Mr. Shackelford: Indeed not.

J. Bell: And you are sort of asking for it when you haven't got the right parties to the suit.

J. Morgan: Don't you have a little more difficult situation relative to the House than you did to the Senate? You talked about experience. But in the Senate you had, as I recall, 54 districts and you had several counties embraced within those districts as they were. But in this case you have many counties which are far under the population standard to carry out the Supreme Court decision. I mean, it will be a difficult situation to give representation to many of the counties in this State, would it not?

Mr. Shackelford: Judge Morgan, I think any reapportionment is both difficult and vitally important. I don't think it is—

J. Morgan: It is more difficult than the Senate reapportionment, though, don't you think?

Mr. Shackelford: I think it is somewhat more difficult, but not greatly more difficult. We are dealing with 205 representatives instead of 54 senators, but when the Senate was reapportioned we had in that connection a considerable redrawing of senatorial district lines, extensive redrawing of lines in that regard.

[fol. 148] Also, on the provisional basis, Judge Morgan, which I have urged, this can be done provisionally by the General Assembly, and we think constructively, at the same time leaving an open end so it can further consider the problem before enacting a permanent plan. We think this is rational and reasonable and possible.

J. Bell: Oh, yes. You could divide the House up among the senatorial districts—

Mr. Shackelford: Yes.

J. Bell: —and have at-large elections, if you wanted to do that.

Mr. Shackelford: Yes.

J. Morgan: What I was asking—

J. Bell: But that might not be what the people of Georgia want.

Mr. Shackelford: It might not be. It might not be what the people of Georgia want, and if they don't want it, when this reconstituted House meets, and the reapportioned Senate, they have an opportunity, and we think a very fine opportunity, to move forward toward a permanent plan.

J. Morgan: I was making inquiry—

Mr. Shackelford: Yes, Judge Morgan.

J. Morgan: —you have some counties down, I believe, to fourteen or fifteen hundred people, eighteen hundred.

Mr. Shackelford: The last census was 1800.

[fol. 149] J. Tuttle: Eighteen hundred seventy-six.

Mr. Shackelford: I don't know what it is today.

J. Tuttle: Eighteen hundred seventy-six, by the 1960 census.

Mr. Shackelford: Yes.

J. Morgan: Which will require several counties of that size to make up the population standard. It would be difficult.

Mr. Shackelford: Yes, sir; it would. Of course, those counties are now, Judge Morgan, in the case of senatorial districts, you have multiple counties, and varying in numbers, varying widely in numbers of counties in the senatorial districts.

J. Morgan: Yes, sir. But at that time they had left one representative that represented that governmental district, but now they wouldn't.

Mr. Shackelford: Now they wouldn't, except they would have a representative not on that small a scale for that particular county, and in instances, but there would be a representative that represented that county along with other counties.

J. Morgan: Yes, sir. Where formerly he represented that county.

Mr. Shackelford: That county alone.

J. Morgan: Yes, sir.

Mr. Shackelford: We believe that—

J. Morgan: That was true back in the senatorial dis-[fol. 150] tricts, probably three or four or five counties making up that senatorial district.

Mr. Shackelford: Yes, sir; it was.

J. Morgan: It's more difficult.

Mr. Shackelford: It is more difficult in that respect and it is certainly different, but we feel that representative would be very carefully chosen; he would be very conscious of his responsibility, in that he had multiple counties to represent; and we think that he would do a conscious, responsible, good job.

J. Morgan: I am not referring to that. I am referring to the mechanics of setting it up.

Mr. Shackelford: Mechanics; I realize that.

J. Morgan: The time limit—

Mr. Shackelford: Yes.

J. Morgan: —that is all we are considering now, anyway.

Mr. Shackelford: Yes. We realize that.

J. Tuttle: You haven't—

Mr. Shackelford: Excuse me, Your Honor.

J. Tuttle: I was simply going to comment on the fact you haven't indicated any concern of the nature I indicated in my comment to the Governor, that is, if nothing is done before 1965 with respect to electing a properly apportioned Legislature, then we go ahead merrily along legislating and legislating with respect to very basic rights, [fol. 151] such as a new election code, and proposing a new constitutional amendment for the people to say "aye" or "nay" on, and that is being done by a Legislature which is improperly organized. Does this—do you think this is of any significance at all or not in your approach to it?

Mr. Shackelford: We think it is of great significance and is of great concern insofar as our own petition is concerned and—

J. Tuttle: You have not requested we do anything about stopping the balloting on the constitutional amendment; I understand that.

Mr. Shackelford: Yes. It is beyond the scope of our petition, but at the same time these are two very vivid examples, one, the constitution, and, two, the election code, in the Legislature being seriously considered at this time and by a House that is malapportioned, and this is the type of thing which greatly accents and sharpens the problem, and it will continue, if, as the State proposes and Governor Sanders proposed in his initial statement, that

we would carry through with a malapportioned House for two more years—two more terms, 1965 and '66.

I would like to return very briefly to—

J. Tuttle: I want to make the further comment with respect to the election laws.

[fol. 152] Mr. Shackelford: Excuse me.

J. Tuttle: The Court doesn't take judicial notice of anything that is still on the loom and hasn't been finally woven, but we recognize fully that one of the very difficult problems that the courts in this section of the Country have had to deal with and are now dealing with is the very question of qualification of voters.

Mr. Shackelford: Yes.

J. Tuttle: And if it be true that there is a serious difference of opinion between Members of the General Assembly, as I think anybody recognizes now there is, as to what the qualifications of voters should be in the State of Georgia, it would seem to me somewhat unfortunate that the voter registration requirements among all the other election provisions should not be passed by a Legislature which is constitutionally organized. I don't know what can be done about it, but I think that is a question maybe both parties ought to direct a little attention to, if possible, before a decision of our Court in this case.

Mr. Shackelford: We will certainly be glad to do so, Your Honor, and we may have further comments to make after the Attorney General finishes his argument today.

I would like very briefly to return to Judge Bell's question as to the timing element and the mechanics, and if the General Assembly should not act by the—during the [fol. 153] allotted time, then under those circumstances we would urge the Court to do as it has done in other States, to enact its own provisional reapportionment, and there are various possibilities open to this. I have already—

J. Bell: You don't mean enact; you mean order.

Mr. Shackelford: Order; by all means. We don't want to make a Legislature out of this Court. We want to have—continue to have separation of powers.

J. Bell: That's right.

Mr. Shackelford: But should order and there are various approaches which we suggest on this score, two serious

approaches, two to which we have alluded, and that is using the senatorial districts and a multiple, either using the entire district or dividing it into subdivisions equal to the number of multiples. If the multiple is two, dividing it into two; or if it is three, dividing it into three.

Now, other possibilities that exist in this regard, one other possibility that has been suggested and the motion filed with you is for there to be weighted voting. We think this creates considerable difficulty that is a very novel and unusual form of government—I mean, an unusual form of cure and of representation, and we call to your attention a statement on this particular subject by the Nebraska court in the League of Nebraska Municipalities versus [fol. 154] Marsh, decided two years ago, and on this score it said:

> "It is proposed that we order a weighted vote in the Legislature to be elected in November. This is an interesting alternative and political economists would be furnished a laboratory from which many and varied conclusions could be drawn. It gives rise to unlimited speculation as to committee appointments, the allotment of time in debate, and the effect of the voices to be heard. Courts are hesitant to experiment with human rights when the people themselves have shown no inclination to so experiment. We conclude not to presently embrace a proposal which may contain evils we know not of."

J. Bell: In other words, you oppose a weighted voting?

Mr. Shackelford: Yes. We think a weighted vote is an impractical approach. It is an approach, but we think it is impractical.

J. Tuttle: One member of the House is quoted in the paper this morning saying he doubted if he will get enough compensation to warrant his coming to Atlanta at all if he got only that percentage of the per diem that would be allocated to his particular county. That is a further problem the Nebraska court didn't comment on.

Mr. Shackelford: Yes, sir; yes, sir. A further approach [fol. 155] which we think we should mention, which again

we think is quite invalid. It would care for the point I think Judge Morgan has mentioned, but it would be quite impractical to execute it, and that is, use the county with the lowest population and then apply multiples to that county, but then obviously we would need a new—

J. Bell: A larger building.

Mr. Shackelford: —need an entirely new room in which to meet.

J. Bell: And then you would be back here asking us to levy taxes—

Mr. Shackelford: And we'd have a totally out-of-hand situation.

J. Bell: —to pay for the new building.

Mr. Shackelford: We do not urge this method of reapportionment, but we thought among the various ones we had befter touch on it. The first two, we think, are thoroughly valid.

In closing, if I may, Your Honors, I would like to read to the Court, and will do so, a statement that was made by the U. S. Supreme Court ninety-eight years ago in a habeas corpus case. We think it has great life and vitality in this situation today. According to the Court:

> "The Constitution of the United States is a lawful ruller and people, equally in war and peace, and covers with the shield of its protection all classes of men at all [fol. 156] times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of men than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."

Certainly today with these decisions of last Monday we have such a situation. Certainly we have a constitutional provision in our own Constitution that is invalid, and we believe the best time to cure the malapportionment from all standpoints is now, and we urge you to do so.

Thank you very much.

STATEMENT BY MR. LEVERETT

Mr. Freeman Leverett: Please the Court—

J. Tuttle: Mr. Leverett.

Mr. Leverett: Excuse me, sir.

J. Tuttle: Just recognizing you, Mr. Leverett.

Mr. Leverett: Thank you, sir.

Before starting on my prepared remarks in their logical sequence, I would like to briefly attempt to answer some of the contentions made by the plaintiffs in their initial presentation.

The first chart they relied upon is entirely different from the situation that we are faced now with. For example, [fol. 157] at the time in 1962 when the question of reapportionment of the State Senate came up, the existing constitutional provisions were in harmony with the proposed and the ultimate apportionment that was effectuated. The existing constitutional provisions in Article III, dealing with the apportionment of the State Senate, provided simply there would be 54 districts, one senator from each district. There was no requirement as to what basis that would be done on. It was done entirely by statute.

So the election that we had in November for senators under the newly apportioned Senate provisions enacted at the present Session were in accordance with the Georgia Constitution. There was, of course, some question about this countywide voting thing, but other than that, the election was legal under the existing Georgia Constitution, even though the method of apportionment had been changed from the three county groupings to a system of 54 districts of substantial equal population. That is not true at this juncture with respect to the House.

This Court itself, in its September the 5th order, declared as follows, quote:

> "The Legislature does not have the power under the Georgia Constitution to change the composition of the House of Representatives."

Unquote.

[fol. 158] In other words, adopting the plaintiffs view we would be required to enact enabling legislation that would

be electing members of the House at the same time the Constitution which would—the constitutional amendment which would make that legal was being voted on.

J. Bell: We could accommodate you in that respect.

Mr. Leverett: No, sir.

J. Bell: We could strike out the present provision in the Constitution and present statute. That would leave the Legislature free to enact a new apportionment statute.

Mr. Leverett: That is a supposition.

J. Bell: That wouldn't be any great problem. And another thing is, there is plenty of time to have an election. The big question in the case is whether or not the Court ought to act with such haste that won't allow the elected representatives of the people to get up the plan of apportionment that they want, so long as it is constitutional. They may want to divide the counties up into little districts, or something, for all I know. That is the big question in the case.

Mr. Leverett: Judge Bell, let me answer your remarks by posing this question. The question as to whether the General Assembly of Georgia could validly enact legislation providing for a new apportionment of the members of the House, contrary to the 3-2-1 formula prescribed in the [fol. 159] existing Constitution, is that a State question or is it a Federal question?

J. Bell: It is a Federal question. The Federal question would involve striking it because that violates the Fourteenth Amendment to the Federal Constitution.

Mr. Leverett: Right, sir.

J. Bell: There won't be any Constitution any longer, so the Legislature can go in and legislate them up an apportionment. The question is, when are they going to do it?

J. Morgan: Just as was done in the Senate reapportionment. Wasn't any constitutional provision, and that is the reason the Legislature reapportioned the Senate rather than the House that way.

Mr. Leverett: No, sir, there wasn't. The existing Senate provision of the State Constitution was not declared unconstitutional, but it was the statute.

J. Tuttle: But that part of it that prescribed—didn't the Constitution itself prescribe the districts, the senatorial districts?

Mr. Leverett: No, sir. It prescribed there shall be 54 with not more than one member elected from each district. It did not say how they were to be apportioned.

J. Tuttle: But I think every student of government recognizes that if there is no prohibition in a State Constitution, the State Legislature has absolute power.

[fol. 160] Mr. Leverett: No, sir. That is the view of certain quarters as to State Constitutions.

J. Bell: In other words, your position is, if we strike out the unconstitutional section of the Georgia Constitution, that section that conflicts with the Federal Constitution, it would leave the State where they couldn't have a Legislature?

Mr. Leverett: I am not saying that. I am saying that it is an arguable question for this reason. In the case of Wheeler versus Trustees of the Fargo School District, in 200 Ga. 323, at 331, this is a statement which appears to be somewhat at variance with the general conception as to the proper scope of a State Constitution. The Court said this, the Georgia Supreme Court:

> "By its provisions . . ." meaning the Constitution " . . . the three branches of our government, legislative, executive and judicial, are created. The three branches of government must look to it for all their power and authority."

In other words, the Supreme Court in one case has interpreted our Constitution, State Constitution, in much the same manner as original colonial charters.

J. Tuttle: That is the case in which the Supreme Court held valid the adoption of a new Constitution under the guise of amending the old one; is that correct?

[fol. 161] Mr. Leverett: That's correct.

Now, Judge Bell, coming back to your question, if the question were mine to decide, I think I would be in accord with what this Court has apparently indicated is its belief, but that is not the problem we are faced with. We are faced with the practical problem that we have got approximately forty Superior Court circuits with a variety and a contravariety of judicial opinion as to what the power of the

Georgia Legislature is, and we have to face the prospect that there very likely will be injunction suits if there is any semblance of ground upon which such a suit could be predicated.

We had five suits in '62 when this question came up, and it was not nearly as controversial as the issues are that are involved in this House reapportionment.

Most people were in general accord the Georgia Senate, because of the fact it was a lameduck body, they could not succeed themselves, it was somewhat a weak body in comparison with the House.

J. Bell: What is it a Superior Court Judge could order done?

Mr. Leverett: Enjoin the election. In the case of—

J. Bell: Enjoin the election of—

Mr. Leverett: Members of the House.

J. Bell: —representatives under a new apportionment?

[fol. 162] Mr. Leverett: Yes, sir.

Look at the case of Kemp versus Mitchell County Democratic Executive Committee in 216 Ga. 276, at 282.

J. Bell: Only thing it would do is leave the State without a Legislature. That is what it is going to come to.

Mr. Leverett: As far as the State courts are concerned, they would hold there would be no vacancies because incumbents would hold over.

J. Bell: We could hold the present Legislature couldn't sit, so we wouldn't have a Legislature.

Mr. Leverett: It would be in a deadlock.

J. Bell: I don't believe we will ever get to that.

Mr. Leverett: I don't know.

J. Bell: I don't think so.

Mr. Leverett: The thing that troubles me, as I have said before, this question as to whether our General Assembly can enact a new reapportionment provision, it occurs to me, is a State question, not a Federal question.

J. Tuttle: You have no more authority for the proposition that a Georgia Legislature doesn't have the complete power to act in the absence of prohibition than the Wheeler case? I don't believe there is much strength in that proposition.

Mr. Leverett: Only two cases, please the Court, in which the courts, as I know of, have indicated that. That is the [fol. 163] Delaware case and the Maryland case. The lower State court, those two cases came up to the Supreme Court, as the Court will recall, from State court decisions, and those respective State courts had indicated, in accordance with what this Court has indicated this morning, that the invalidation by a Federal Court of the existing constitutional apportionment provision left the Legislature free to enact new reapportionment legislation freed from the proscriptions of the existing constitutional provisions. That may be true; I don't know. I am simply trying to raise the question and show the Court we have a serious question, that we don't know what the result is going to be.

J. Tuttle: I am just trying to show my wisdom, because this is one question that was on the bar examination that I took in 1923. It was the only question I remember on the bar examination. That was: In the State of Georgia, where does the power reside that was in the British Parliament? And I had no hesitancy about saying it resides in the Georgia Legislature except as prohibited to it by the Georgia State Constitution.

At that time, forty years ago, forty-one years ago, I had no doubt of that being true in every State in the Union, and I don't believe there is anything in the Wheeler case that throws any real doubt. That was not involved in the [fol. 164] Wheeler case; that issue was not involved in the Wheeler case, was it?

Mr. Leverett: No, sir. This question has never arisen in Georgia specifically.

J. Tuttle: So it is dictum at best.

Mr. Leverett: And the statement, Judge Tuttle, that you have made is certainly in the classical definition of a State Legislature, that a State Constitution is a limitation of authority—

J. Tuttle: That's right.

Mr. Leverett: —and not a grant of authority—

J. Tuttle: That's right.

Mr. Leverett: —whereas the Federal Constitution is a delegation of authority.

J. Tuttle: That's right.

Mr. Leverett: The thing that is causing me concern is this thing is not clear-cut in Georgia enough to an extent we cannot say some Superior Court Judge is not going to hold otherwise.

This Court stated in 1962 you were reluctant to utilize your State power under 2283 of the Judicial Code.

J. Bell: We will put that down as a plus to delay, a plus for your argument. We will give you a plus on that.

Mr. Leverett: Thank you, sir.

J. Bell: What is the other reasons why we ought to delay, [fol. 165] if any?

Mr. Leverett: The statement was made that the Governor could simply enlarge the call. That is not true. That has not been the interpretation that has been uniformly placed upon the provision of the Georgia Constitution. It says that no legislation shall be considered which is not mentioned in the call.

Well, now, once the Legislature convenes the call is functus officio.

J. Tuttle: How soon could he now call it?

Mr. Leverett: He could call it immediately after this past one is adjourned. I don't think he could issue a call in—

J. Tuttle: Twenty-four hours notice? Forty-eight hours notice?

Mr. Leverett: I think he could.

J. Tuttle: In effect, it is the same thing; in effect, it is the same thing.

Mr. Leverett: Well, the practicality of having another Session immediately following one that has already been rather hectic and time-consuming and people are getting their patience tired—

J. Tuttle: That is a difficult problem. We understand that.

Mr. Leverett: Some of the senators are having to campaign; they are not interested in being up here while their [fol. 166] opposition is at home shooting at them.

Now, another thing I think was brought out was, the statement was made that the circumstances are even more conducive to reapportionment now than they were in 1962. That certainly is not true. In 1962 Governor Sanders had

just been elected. He was the Governor-Elect, and all of the influence and prestige that a Governor-Elect has was brought to bear in the September 27 Session. He had just been nominated and received the nomination on the Statewide primary held earlier that year. That is not true now. I do not think it would be less difficult now to have reapportionment effectuated than it was in '62. I think, if anything, it would be certainly more difficult in view of the fact we just had one Special Session.

The statement was also made that the Alabama case, that the question of timing there, that they had no problem, that it was substantially the same if not perhaps a little less than is available this year. The answer to that is simply this. Look at what they did. They enacted two provisions, one was a 67-senator amendment; the other was a Webb-Crawford Act; and the Supreme Court held neither one of them met constitutional requirements. Now, that is a strong argument against haste, it seems to me, rather than an argument for haste.

Judge Morgan brought up the question about reappor-
[fol. 167] tionment of the House being more difficult. I think that is certainly true. You have this to consider. You not only have a larger number of people, but your Senate was a lameduck body. There was not a member of that Senate, other than the Fulton County senator, in 1962 who could have been re-elected unless you had reapportionment.

Now here you are asking them to cut themselves off. Some of them have been nominated before they even take office. So, we think it is more difficult, obviously, to reapportion the House than it was to reapportion the Senate.

Now, Judge Tuttle, with respect to your question about the legislation that is being enacted, I know of no case in which any court has indicated that they would enjoin the Legislature from legislating. I believe that Kenny versus Branhold, cited by the U. S. Supreme Court, held that legislators were not subject to suit, certainly with respect to legislative functions. I know in Louisiana this Court, the Fifth Circuit, I think, held that they were if they got outside the realm of legislation.

But aside from that, there are a number of cases—

J. Morgan: I think Judge Tuttle's question was on—the question of the allowance of time, within the equity powers, it was questionable whether a basic change in the law [fol. 168] should be enacted or presented by a maladjusted Legislature. I think that virtually was his question.

J. Bell: During the period of delay.

Mr. Leverett: Was that merely the question, or was the Court also concerned with the validity of any legislation that might be adopted?

J. Tuttle: I wil. start out again by expressing my view. The Court will be very reluctant, even though it finds, as we have already indicated, the Supreme Court has required that we find that a Legislature is improperly organized to invalidate—I will complete my sentence—the Court will be very reluctant to validate any legislation enacted even by an unconstitutionally organized Legislature. When it is called to the Court's attention by an injunction suit to seek relief at a time that the Legislature thus improperly organized is still working on the legislation, and at a time when the legislation can be inquired into, if it is serious enough as a condition for granting more time for the reapportionment, it may well follow the equity powers of the Court to prevent this kind of legislation from being effective as a condition to granting more time. Let's put it that way.

Mr. Leverett: With respect to the first aspect of your response—

J. Tuttle: Yes.

[fol. 169] Mr. Leverett: —Judge Tuttle, there are a number of cases from other States. In fact, I think one of those cases, United States Supreme Court—I had notes in my file. I haven't had an opportunity to read it. This question came up just this morning. Matthews versus Hamlet, in which other courts considered this question.

There's been a more recent decision from Mississippi, and this last year the Georgia Supreme Court in the Dixie Fireworks case up and said, in effect, that the de facto doctrine—

J. Tuttle: Once the legislation is passed by a Legislature that has not been attacked, the Court is very loath if not forbidden from knocking it out. That is not the case here, though.

Mr. Leverett: Right, sir.

J. Tuttle: This Legislature in Special Session has not enacted any laws as yet.

Mr. Leverett: Insofar as Your Honor's remark had reference to the question of timing, I would say this, that, number one, I know of no case in which that has been held to be a legitimate consideration. You are then, seems to me, becoming immeasurably involved in the legislative process if you undertake to try to weigh the merits or demerits of pending legislation against the necessity for more precipitate action.

[fol. 170] Now, secondly—

J. Tuttle: Could anyone suggest—could you suggest that a Legislature organized as you are going to have to finally organize the Legislature, or the Legislature will have to organize itself, would come up with exactly the same voters code that will be produced by this malapportioned Legislature? No. No one can suggest that; no one can say that. We don't know. Or can anyone suggest that a properly apportioned Legislature will recommend to the people for adoption the same kind of a Constitution for the State of Georgia that is now about to be, if it is to be, put out by this malapportioned Legislature?

Mr. Leverett: No, sir. But let me come back with this reply. Assuming that be true. What effect is immediate relief going to have on that? Are you implying the Court would require that this present Session be completed at which we presume the election code will have passed, and, number two, the new Constitution will have been submitted, that we not only have a Special Session to reapportion but also to amend and change what has already been done?

J. Bell: Oh, no.

J. Morgan: It hasn't been done.

J. Tuttle: It hasn't been done.

Mr. Leverett: It will have been done by the middle of next week.

[fol. 171] J. Morgan: This case is in the breast of the Court right now. That is the very question we are raising now.

Mr. Leverett: I want to get this clear in my mind. Is the Court suggesting that the General Assembly be enjoined from proceeding to consider—

J. Tuttle: It would not be necessary for the Court to enjoin the Legislature. So far as I know this has not been suggested. I think it is probably within the power of the Court, once this issue is raised before any laws are passed, to hold void and of no effect any laws that are passed after a hearing of this kind if passed by an unconstitutionally organized Legislature.

Now, the Court would be very reluctant to do that. There is no question about that. But this is one of the essential problems we have to face. It is a very critical problem, it seems to me.

Mr. Leverett: Please the Court, I will furnish the Court with a citation of these cases; also Vanderbilt Law Review 501. That is, to me, a most extraordinary proposition that this Court or any other court could invalidate laws or a proposed Constitution to be submitted because of the malapportionment of the Legislature.

J. Tuttle: Well, I have raised the question.

Mr. Leverett: You may feel otherwise, but I will submit these citations. I don't have the Mississippi case. There's been a recent case from Mississippi in '63, I think.

[fol. 172] J. Tuttle: I call your attention also to the fact that in connection with that it is implicit in the Georgia Constitution and has been ever since the Georgia State was organized that the Georgia Constitution can be supplanted by a new Constitution only by a convention which is itself apportioned to population.

Now, I am fully aware of the 1945 decision; I am fully aware of that. But that was a decision entered by the Supreme Court on apparently the theory that it had already been voted on by the people.

Mr. Leverett: No, sir.

J. Tuttle: Well, I am simply giving you my view about it. It was apparently on the theory it was voted on by the people and the people had full power to act regardless of the origin of the proposal.

Now, then, we are not now in that situation. We are now in a situation where the Legislature is about, maybe, about

to propose a new Constitution, and it is a new Constitution, no question about it.

Mr. Leverett: That's correct.

J. Morgan: The Fargo case held that.

J. Tuttle: It is a new Constitution.

Mr. Leverett: Yes, sir.

J. Tuttle: The question you now raise is whether this Court would have the power under these circumstances to [fol. 173] prevent that new Constitution, proposed by a Legislature instead of a Convention, going on the ballot to be voted on this fall. I would have very little doubt about the Court's power to do that.

Mr. Leverett: On the Fourteenth Amendment ground, or because it would be in violation of the State Constitution?

J. Bell: Mr. Leverett, the best answer you have to Judge Morgan and Judge Tuttle, it seems to me, is Mr. Shackelford just stated in open court this was beyond the scope of his petition. I understood him to say that. I don't know that this is before the Court unless the Court would put it as a condition or should put it as a condition as to any delay, and I don't know whether that is in the scope of it or not. Mr. Shackelford didn't seem to care to argue this.

Mr. Leverett: I didn't catch his remarks in that respect; I'm sorry. I apologize.

J. Bell: He said it was beyond the scope of the petition. That is what I understood him to say. He can tell you about it in his reply, I imagine.

J. Tuttle: The Court is asked here to delay—you don't mind my arguing the point with you briefly, I'm sure.

Mr. Leverett: No, sir.

J. Tuttle: It is somewhat unusual and it is new in con- [fol. 174] stitutional history within the last twelve years for a court to find that a person is being deprived of his constitutional rights and not being vindicated then and there. The well-known exceptions are the school desegregation cases where deliberate speed was the order of the day, and these cases last Monday, we fully recognize the Court on last Monday said under proper circumstances the vindication of these plaintiffs rights and the rights of the people they represent may be delayed if equity demands it.

Now, then, having proposed that problem to us, we take up the consideration of all the provisions of equitable consideration, and one of these, I think, is the fact this Legislature is merrily going on its way, although illegally constituted, to create basic new laws for the State of Georgia which may embed in our Constitution and Laws some of the results that reflect the over-representation of the present Legislature; and I have stated that as fairly as I can without throwing off on anybody.

Mr. Leverett: All right, sir. Now, let me come back with this. As far as the Constitution is concerned, it will have to be voted on in November—

J. Tuttle: Yes.

Mr. Leverett: —in which event everybody's vote counts the same.

[fol. 175] J. Tuttle: Of course. But they have to vote "yes" or "no" on a document which was prepared by a malapportioned Legislature.

Mr. Leverett: Secondly, assuming that the election code contains provisions that would not have been enacted or would have been enacted differently had both houses been apportioned, I presume at some point both houses will be reapportioned, and that reapportioned Legislature is certainly free to change anything that this particular Legislature does, and undoubtedly will change some of the things this Legislature has done.

J. Tuttle: In other words, they can repeal what is done wrong, if anything is done wrong?

Mr. Leverett: They have got an adequate political remedy.

Well, please the Court, I'd like to briefly touch on the pertinent things that I think should be considered in considering the question as to whether any relief should be granted at this stage and with respect to the time element of the relief. I think these factors should be considered.

Number one, that the decision of this Court in 1962, which required reapportionment of the House—of the Senate in something less than six months, that is, from May the 25th to the November General Election, with the possible [fol. 176] exception of the Alabama case, was one of the

most severe opinions rendered in any of the reapportionment cases.

J. Tuttle: And it got behind us quickly and everybody is pleased with it.

Mr. Leverett: No, sir. I am coming to that. Secondly, notwithstanding the difficult task that the Legislature was faced with—

J. Bell: I'm glad you said "opinion" and not "order", because we never did order you to do anything.

Mr. Leverett: I am going to touch on that too.

J. Bell: Everything you did was voluntary. May have been sort of shotgun type.

Mr. Leverett: All right, sir. Notwithstanding that fact, the harsh timetable, we consider it was harsh, that was imposed upon us, the General Assembly, the Governor and Governor-Elect Sanders proceeded to execute their sworn obligations in a prompt and complete manner. I think that this Court itself would have to feel that they should be commended for the job they did.

J. Tuttle: I am sure I speak for my colleagues. We do commend, and I think it is noteworthy, it is noteworthy the State of Georgia has met and solved these problems more quickly and apparently more satisfactorily than any State that has been in this type of litigation.

[fol. 177] Mr. Leverett: You just stated my next few sentences, so I will skip over that.

I would like to re-emphasize that not one time has this Court had to issue an injunction in the Toombs case, that we have acted on the basis of opinions and declaratory judgment.

J. Bell: What is it you want?

Mr. Leverett: That is at the end of my remarks. You want me to tell you now?

J. Bell: It would help me a lot if you'd just tell me now.

Mr. Leverett: All right. It's simply this. We feel that considering all the circumstances that the public interest would be best served by permitting the Legislature to enact, if possible, the necessary, if they can, reapportionment provisions in the Constitution in the Session that they are in now, and then reapportion the House at the beginning of

the January, 1965 Session, becoming effective in the 1966 elections. I will come to that, and I don't want to—

J. Bell: Suppose we were to be inclined to grant you some relief, but we wanted to put it on the condition you couldn't do anything at the next Session, the coming January Session, except reapportion, and maybe pass the necessary laws to have an election to get—to elect a properly apportioned Legislature, who would have to be parties to [fol. 178] that suit?

Mr. Leverett: I would think—I would doubt very seriously if the Court could issue such an order.

J. Bell: I understand. I know you doubt it.

Mr. Leverett: I think you can say—

J. Bell: If we are going to do it, who should be parties to the case?

Mr. Leverett: Seemingly the entire Legislature.

The Attorney General just called to my attention the fact I believe they are supposed to have an Appropriations Bill on that.

J. Tuttle: Is that true, or was the Appropriations Bill passed this last January?

Mr. Leverett: I believe you have one next year, don't you, Mr. Smith?

Mr. Smith: Next year they are due to have one.

J. Bell: No reason why you couldn't put that off, put it off until you can have a—until you can apportion the Legislature. You have got to apportion the Legislature. It's just a matter of when you are going to do it. You can do it now or you can do it with a new group of people; do it in January. That is what we are talking about here this morning. That is all there is to the case.

Mr. Leverett: In other words, you mean not have any legislation in Georgia until the beginning of 1967?

[fol. 179] J. Bell: Well, you can't—I haven't heard anybody say you wanted to put it off two and a half years. I didn't even hear the Governor say that.

Mr. Leverett: I think the effect of what the Governor said and the effect of what I am saying here is that we feel reapportionment could be better effectuated by the 1965 General Assembly.

J. Bell: But you haven't said you wanted to let them stay in two full years.

Mr. Leverett: Yes, sir. But would it be feasible to cut them off in the middle of a term?

J. Bell: That is what I am asking you. How do you go about doing it?

Mr. Leverett: I think the procedure would be, and I think the Supreme Court has indicated as much in each of these six decisions, that is a question for you to consider, first. In one case the Supreme Court itself said that there is no necessity for any further action until 1965.

J. Morgan: Which case was that?

Mr. Leverett: I believe it was the—it was the Maryland case.

J. Bell: Mr. Leverett, that is because the Legislature had already been elected for that period of time. Here this present House is serving terms which expire this year. Now you are going to have to elect some more people starting in January, to start serving in January. My question is: [fol. 180] What about some sort of a special election after they have had a chance to meet and get up a proper reapportionment, instead of letting them serve two more years; that would be two and a half years from now.

Mr. Leverett: That is a solution. I am not prepared to say—

J. Bell: All I am asking is, who would be parties to the case?

J. Tuttle: I think the mechanics would be, I think, rather simple. This Court would refrain from entering any injunction as requested by the plaintiffs on condition that the State Legislature elected this fall have the power only to legislate with respect to reapportionment and providing for the election laws to elect that new General Assembly, and as long as that was done and that was all that was done the Court would withhold its hand with respect to any further injunctive order. Wouldn't need to make any other parties at all.

J. Bell: That is sort of the same thing we did last time.

J. Tuttle: That's right.

Mr. Leverett: I don't doubt the power of the Court to do that. It would raise some serious question—seems like

to me you are getting over into the doctrine of unconstitutional conditions, imposing a constitutional condition—

J. Tuttle: What you really want and what the Governor asked for, I'm quite sure, is, first of all, the Legislature [fol. 181] apportion itself.

Mr. Leverett: That's correct, sir.

J. Tuttle: And, number two, that the Legislature have reasonable time within which to consider and solve that problem.

Now, you are also implicitly requesting, although no one has mentioned it, the right to legislate in all other respects until there is final apportionment, and that is the problem that strikes me as being a very serious one.

J. Bell: And for two and a half years.

J. Tuttle: And for two and a half years.

J. Bell: Assuming we want to cooperate with you to the end that the Legislature is going to do their own reapportioning, you haven't been cooperating with us.

Mr. Leverett: That is what we are trying to do. We are trying to be given an opportunity to cooperate. We feel that any effort to have another Special Session in 1965 to cut off somebody in the middle of a term would be not a great deal better than requiring them to have a special election after the November General Election or in the November General Election to cut off some already nominated without opposition.

J. Tuttle: Might be much better and quicker and much simpler to get it behind us, to let it be done this summer rather than next summer is what you are saying?

Mr. Leverett: No, sir. I am saying it would be equally [fol. 182] chaotic in either case, in my opinion.

J. Bell: Neither one will suit you, then?

Mr. Leverett: No, sir.

J. Bell: All right.

Mr. Leverett: Now, notwithstanding—

J. Bell: Only thing that will suit you is to let it run on two and a half years?

Mr. Leverett: I don't say there aren't other solutions. I say myself that—

J. Bell: Name one.

Mr. Leverett: I have not—no others have been called to my attention that would seem satisfactory.

J. Bell: Well, we are in the solution business. You have to help us.

Mr. Leverett: We are trying to.

J. Bell: All right.

Mr. Leverett: Notwithstanding the fact that in 1962 the Legislature and the Governor, the Governor-Elect, did fulfil their responsibilities and reapportionment legislation was enacted.

J. Tuttle: No need not really argue to us, Mr. Leverett, the effect if we do nothing until this Legislature is elected and they meet in January, 1965, that they will do their constitutional obligation as they have done in the past. We know that.

[fol. 183] Mr. Leverett: I am not arguing that. I am simply pointing out this fact, and I think this is the whole heart of the thing, that this legislation that we enacted in '62 was done in too much of a hurry. We had five lawsuits. You recently had one case in this Court in Dorsey versus Fortson.

J. Tuttle: That was indicated—the Legislature knew that issue was a litigable issue, because it was argued—it was litigated before the legislation was cold on the books about whether the senator should be elected by their own district or county-at-large. That is one of the points you raise, isn't it?

Mr. Leverett: That is one of the points.

J. Tuttle: They went into that with their eyes open.

Mr. Leverett: That case is on appeal, as I understand it. I understand a notice of appeal was supposed to be filed.

J. Bell: I understood the State was appealing it.

J. Tuttle: It is the law until it is reversed.

Mr. Leverett: It is an open question in respect to this Court's decision.

There are other States that have—

J. Bell: That wasn't done in haste; that was done with great deliberation. I read about it in the newspaper. You said if you could make them vote districtwide, countywide, it would help somebody, I forget who it was going to help;

[fol. 184] it was done for a purpose. Whatever the purpose was, I don't remember.

Mr. Leverett: The urban areas themselves wanted it that way.

J. Bell: Nobody slipped it in or anything like that. It was done in the Legislature. It wasn't an oversight, if that is what you are saying.

Mr. Leverett: Regardless of that, the 1962 Act does contain a number of deficiencies. One provision is unconstitutional and nobody has noticed it, and that is a provision that says the senator must be a registered voter. That is not in the Constitution. That was put in on a floor amendment. They left out one section completely that was supposed to have been in there. I don't remember whether it related to the special primary or the general primary, but in the rapidity with which the thing went through, it was not a very commendable—

J. Bell: If you are going to reapportion, we assume you will do it in January, so that won't be any rapid haste; won't be any great haste about that. The question is: What about after January? You want this same malapportioned Legislature to stay on in? That is what you are arguing.

Mr. Leverett: That is what the Supreme Court said a District Court could very easily do—

J. Bell: All right.

Mr. Leverett: —in these cases, and I am going to discuss [fol. 185] those momentarily.

J. Bell: All right.

Mr. Leverett: In other words, we feel that the General Assembly could have done a much better job following the 1962 decision if they had had more time, if these things could have been given more complete study.

Fourthly, as Mr. Shackelford pointed out, 131 candidates for the House have already been nominated in county primaries. That Code Section, Judge Morgan, is 34-1307. You raised a question about it.

There is no existing statutory authority whereby those nominees who have already been nominated could be upset and required to run in the September Statewide Primary. Now, of course, laws could be passed to change that. We recognize that. But the Supreme Court must have meant

something when it said the District Court could consider whether State elections were already in progress in determining whether to grant relief in 1964.

J. Tuttle: Of course, the fact that this General Assembly was being called in Special Session for the purpose it is meeting for and the fact we had caveated two years ago the malapportioned lower house I am sure made it such no man who ran in May of this year wasn't aware of the fact he might well be running for a seat that didn't exist in 1965.

[fol. 186] Mr. Leverett: No, sir. I am inclined to disagree, Judge Tuttle. If I recall, two members of this Court expressed the idea, the opinion in one of the subsequent decisions of this Court in the Toombs case that reapportionment was required only with respect to one house. I believe, Judge Tuttle, that you—

J. Tuttle: Yes; I did. Really what I meant to say is the Supreme Court has granted certiorari and everybody in government knew this was going to be a serious question.

J. Bell: In addition to that, the redistricting cases have been handed down. That was about the deathnail.

J. Tuttle: And the county unit thing, one person—one vote.

Mr. Leverett: Looks easy—hindsight is always better than foresight.

J. Bell: We know a lot of people have already been nominated, and that is an equity that is to be considered. We know that—

Mr. Leverett: I think you should consider this.

J. Bell: —and we will consider that. 105 people have already been nominated.

Mr. Leverett: Right. I think you should consider this, that we were in such a situation in 1962 with elections being held one method in Fulton County and a different method in all other counties of the State, the Savannah court reaching one result and the Fulton County court reaching [fol. 187] another result, that this had become a spectacle; it was almost a joke in Georgia as to our governmental processes, and those things tend to bring the whole democratic concepts into disrepute.

Secondly, hasty action such as would require a reopening and new elections in 1964, that tends to prevent candidates that would otherwise want to run, worthwhile candidates, from getting in.

When these things come so fast, people don't have an opportunity to have it impressed upon them, to evaluate their situation and make an intelligent decision as to whether they want to offer for office. I think that should be considered with regard to the timing of this particular problem.

The language of the Alabama case, I am not going to quote that, this Court has read it, it's been put forth in several newspaper articles about respect to the timing of relief and the fact pending elections may be in progress, that the Court can consider.

I would like to call the Court's attention to the Texas case, Bush versus Martin, 224 F. Supp. 499. In that case the Three-Judge District Court on October the 19th, 1963, rendered an opinion holding the districts to be unconstitutionally composed. With respect to relief the defendants, the State defendants, contended that reapportionment [fol. 188] should not be required until the Texas Legislature had had an opportunity in 1964, its regular session in '64, to consider the matter. The District Court said, "No"—

J. Tuttle: That is exactly what we did in the Congressional redistricting case.

Mr. Leverett: Said, "No; if we do that there cannot be any effective relief until 1966 because the Texas election machinery is already in progress." It didn't spell out clear enough for me to be able to discern exactly what they meant, but we are accepting their statement at face value.

The Court said that "unless we in effect require a Special Session prior to the regular '64 Session, that these Congressmen who are elected in '64 in the General Election will serve for two more years under this malapportioned congressional delegation arrangement that Texas has." So, they declined to grant the relief asked by the defendants, at least to postpone the relief.

Justice Black granted a stay. The case went up on appeal and on motion to affirm, the Supreme Court affirmed

per curiam but they stated this: "The motion to affirm is granted and the judgment is affirmed on the authority of Wesberry versus Sanders without prejudice to the right of the appellants to apply by April 1, 1964 . . ." that is, the State ". . . to the District Court for further equitable [fol. 189] relief in light of the present circumstances including the emminence of the forthcoming election and the operation of the election machinery of Texas noted by the District Court in its opinion."

In other words, the Supreme Court itself on its own told the lower Federal Court in Texas to take into consideration the fact that the defendants may apply for further relief because of this emminence of the election process that is now going on.

I do not know, frankly, what has happened in Texas. It was too early this morning to call the Attorney General to find out. This Court may know.

J. Tuttle: They delayed it.

Mr. Leverett: They did?

J. Tuttle: They delayed it, because the alternative to run at large, a State as big as Texas was, they felt it would be utterly an impossibility, an impossible task. I know the District Court did delay carrying it into effect.

Mr. Leverett: All right, sir. Not only in the Alabama case decided this Monday, but the New York case, the Court said this: "Since all members of both Houses of the New York Legislature will be elected in November, 1964, the Court below, and acting under equitable principles, must now determine whether, because of the emminence of that election and in order to give the New York Legislature an [fol. 190] opportunity to fashion a constitutionally valid legislative reapportionment plan, it would be desirable to permit the 1964 election of legislators to be conducted pursuant to the existing provisions, or whether under the circumstances the effectuation of appellant's right to a properly weighted voice in the election of State legislators should be delayed beyond the 1964 election."

To me, the most significant thing about all of these Monday decisions is that in each one of them, the very last thing that the Supreme Court said was that the District Courts were to determine whether to permit elections in '64

or in '65, in one case, and '66, I believe, in one case, to take place under the existing apportionment, or whether to require some remedial relief immediately.

That was true in the Colorado case, notwithstanding the fact in that case, in the 1964 election approximately one-half of the senators would be elected for a four-year term, not a two-year term but a four-year term.

J. Tuttle: Mr. Leverett, should the Court take into consideration the degree of disparity in Georgia as related to the question of what relief and how quickly we should grant relief? I have read the record in the New York case. The disparity in the New York case is nothing like the disparity that is present in the Georgia House of Representatives, [fol. 191] nothing like it. And I am quite sure you will find the disparity is not nearly as great in any of these other States. I know it is not in Alabama as is now present in the Georgia House of Representatives. Should we consider the glaring disparity in connection with how long the condition should be permitted to remain?

Mr. Leverett: I don't recall any statement by the Supreme Court one way or the other on that in any of these cases. I do recall the Supreme Court said you should consider both houses, and if you do that you must necessarily come to the point that the Georgia Senate is apportioned on a substantially equal population basis.

I don't think the disparity exceeds something between twelve and fourteen percent on any of these districts. Some of these Fulton County districts, I know of no way of determining exactly how many people are in them because the lines, no one has taken a census in these lines that I know of. They were in some degree arbitrarily drawn by the Fulton County delegation.

In the Maryland Committee versus Tawes, both house members were elected for four-year terms in that case, and since the Court noted the election would not take place until 1966, the Court declared outright that sufficient time now remains for the laws to be changed before the 1966 election.

[fol. 192] Of course, there again I concede that there you were not having an election until '66. Here we are having

one in '64, but the result is the same, and that is that you would have a period of approximately two years under an existing apportionment found to be illegal in the Maryland case, but yet the Supreme Court in that case seemingly did not say the District Court cannot consider whether to grant relief.

As I interpret this remand, it was, in effect, a direction that you need not and shall not grant immediate relief but simply require something be done prior to the '66 election.

In the Virginia case, Davis versus Mann, the Court indicated reapportionment need not be required prior to the 1965 election. The next election for members of the General Assembly, or whatever it is, the House of Delegates, whatever it is called—

J. Tuttle: House of Burgesses, or something.

Mr. Leverett: —was not to take place until '65, to take office in '66, and the Supreme Court, in effect, said the same thing there.

J. Bell: Under the new split session of the Legislature—I think that was a constitutional amendment having to do with the Appropriations Bill—

Mr. Leverett: Right.

[fol. 193] J. Bell: —as I recall, the Legislature met something like ten days, fifteen days, and then adjourned.

Mr. Leverett: Adjourned for several weeks and come back.

J. Bell: You think next year is the year that happens?

Mr. Leverett: I am advised—that is my recollection, that the—beginning right immediately following the election—

J. Bell: Ask Mr. Smith sitting over there how many days. How many days does the Legislature meet before they adjourn?

Mr. Smith: Around thirteen or fourteen, Your Honor, thirteen or fourteen, and we have a two-week break.

Mr. Leverett: I don't recall whether that is in the section on the—

J. Bell: What is that section?

Mr. Leverett: 2-1603.

"The General Assembly shall meet in regular session on the second Monday in January, 1963, and every odd-numbered year thereafter, for no longer than twelve days to organize . . . " every odd-numbered year, that's right, that would be '65, " . . . to receive the proposed General Appropriations Bill, and to attend to other matters, and reconvene on the second Monday in February of each odd-numbered year for no longer than thirty-three days."

[fol. 194] And it goes on to say about the even-numbered years. That is 2-1603. That is Article III, Section IV, Paragraph 3.

J. Bell: That is just thirty-five days. What happened to the other five?

Mr. Leverett: Twelve and thirty-three, forty-five days.

J. Bell: Forty-five days?

Mr. Leverett: Forty-five.

J. Bell: Split session is just thirty-five the next year?

J. Tuttle: Is it not more than forty-five days?

Mr. Leverett: Forty-five.

J. Bell: I thought it was limited to eighty days under the Constitution, the regular session. That hasn't got anything to do with this case, though.

J. Tuttle: It says not more than thirty-three and twelve.

J. Bell: That would cut them down to thirty-five next year.

Mr. Leverett: Forty days in even-numbered years and forty-five days in odd-numbered years, Judge.

J. Bell: All right.

Mr. Leverett: The last case, of course, is the Delaware case, and that case, the Court simply said it was up to the District Court to determine whether the '64 elections would be affected or not.

We think that in view of the fact that Georgia has [fol. 195] demonstrated a readiness to comply with these court decisions, we consider the lateness of the hour, the fact that we have just gone through one—presently going through one hectic Special Session, the Legislators are tired, that this is not the proper atmosphere or environ-

ment to effectuate a cure or serious reapportionment. We think all these things being considered, considering the fact this is an equity case which the Court has some discretion as to relief, the public interest would be served.

With regard to Mr. Shackelford's statement about this being cancerous, we think there is always the possibility that the cure sometimes can be worse than the illness or the malady.

We hope the Court will consider those things.

Thank you.

Mr. Cook: Nothing further. We represent only the defendant Ben W. Fortson.

J. Tuttle: Yes, sir.

STATEMENT BY MR. DILLARD

Mr. Dillard: May it please the Court, I will just express a few—

J. Tuttle: Are you still in the neutral corner?

Mr. Dillard: I was going to say, Your Honor, to allay any fears Mr. Shackelford might have about his odd number, his unlucky number, that he could consider himself at [fol. 196] least thirteen and a half. So—

J. Bell: Well, we will regard you as a great neutral.

Mr. Dillard: Well, I am a little more than neutral in this, I think really, Your Honor. We don't fully go with the other defendants in this case, and that is the position that we have taken pretty well all along in our appearance before you on behalf of Mrs. Mann.

We suggested some of the difficulties that are involved. I believe we even threw out the question of the weighted vote. And we realize, as we have all along, that there are considerable problems in going to any weighted vote, particularly where we do not have any experience.

Undoubtedly, it would be trite to say there are no problems involved in this reapportionment. They are tremendous, and we have conceded all along that the General Assembly was not appropriately reapportioned and that consideration should be given to population in the reapportionment so that at least a majority of the representatives in the General Assembly are elected by a majority of the people.

Now, whether that will be still followed as far as the principle of law or whether the cases of Monday will change that concept might still be open to some consideration. We have urged, as we did in the original brief, that in a bicameral form of government that one body, at least, [fol. 197] should be on population, that is the way we saw it at that time, and that the other body should be based on some reasonable scheme taking into consideration also the question of population.

I think that certainly the State should be given an opportunity to reapportion itself as I am sure this Court wishes them to do. I cannot agree with the other defendants that it is necessary to put it off for some two years.

I would urge Your Honors, in reaching your decision, that possibly we should consider, as Mr. Shackelford has suggested, a declaratory judgment so that we would at least get the expression of the Court, and that the State will be under some voluntary compulsion to do something.

I would urge that possibly the State be given time to do that. I do not suggest, however, that the Court itself should delay in giving us their guidelines or viewpoints or the timetable. I believe the State should be put actually under some timetable in which to do this. So far as whether it can be done in the present Session or whether the General Assembly should be given an opportunity to go home and rest for a few days before they are called, we will not quarrel with that.

I doubt seriously that actually the General Assembly as [fol. 198] it is presently apportioned would really come up with a Constitution that would be acceptable to the people, or that it would really come up with an election code that would be acceptable or would be the same type of a code that would be proposed by a General Assembly differently apportioned.

J. Tuttle: The people don't have a chance to vote on that. If it goes into effect there is the problem of bringing the forces to bear on amending it or repealing it.

Mr. Dillard: Yes, sir. And I think with those two grave problems pending and with the reapportionment problem pending—of course, we have got three serious problems,

but I submit that they all should be worked out pretty well simultaneously so that they will not have to be done over again. And I think without question from the decisions handed down Monday the House is going to have to be reapportioned and substantially on the question of population. The State might be given an opportunity to consider whether or not it wishes really to continue with a bicameral form of government. If we are going to have both houses strictly on population, then the two legislative bodies would seem to be unnecessary.

J. Tuttle: Of course, the question was asked as to what authority or power the Court would have with respect to the actions of this present Session of the Legislature. [fol. 199] Much has been said over the desire of the members of the Legislature in good faith to comply with the requirements that have now been set down by the Supreme Court. One possible course of action along that line would be for the present Session of the Legislature to recognize that it is not the kind of a Legislature that should now adopt a voting code or a proposed constitutional amendment, and resolute to that effect and abandon the effort until the properly constituted Legislature is organized.

Mr. Dillard: Yes, sir.

J. Tuttle: This is also within the possibility.

Mr. Dillard: Yes, Your Honor. And frankly, Your Honors, I think that is—

J. Tuttle: Require no action by the Court.

Mr. Dillard: I think that is what should be done. But, of course, that is not within my realm; that is another field.

I think that really these two questions should be put off until the House is reapportioned.

J. Bell: Why are we going to keep arguing about that for when Mr. Shackelford says it is not in the suit? You are a defendant in the suit. You can't make a suit any broader than it says it is.

Mr. Dillard: All I am saying is this. All—

J. Bell: Are you suggesting to do away with one house of the Legislature in the next two or three weeks?

[fol. 200] Mr. Dillard: No. I am suggesting you give the Legislature—

J. Bell: We are dealing mighty lightly here with weighted matters, I think.

Mr. Dillard: Give the Legislature an opportunity to reapportion itself or to decide what type of government, if it wishes to change. I am not saying wipe it out in two weeks; no, sir. And I am not saying—

J. Bell: You haven't said anything about time. Have you got any ideas you could give us about how much time they ought to have to do these things? That is the main problem in the case. We are not supposed to be engaged in political philosophy. We are just supposed to give constitutional rights to people when they are being deprived of them, and the deprivation now is—the question is: How long are we going to let "now" continue?

Mr. Dillard: I would think there is sufficient time for that to be done this year. I do not see there is any necessity for having a limited Legislature in Session for the next two years which will be dealing with the question of reapportionment, questions of the budget, questions of appropriation, where the money is going.

J. Bell: You think they—this present Legislature ought to reapportion; that is your position?

Mr. Dillard: Yes, sir. It ought to be done, and I think with the question that has been raised, so far as the legal-[fol. 201] ity of the present Legislature to do this, I think that has been fairly well decided, that actually these would be de facto officers and could do it unless the Court declared it illegal and the office vacant, which I would not suggest you do.

J. Bell: No question about that.

J. Tuttle: They have the power to pass a new law.

Mr. Dillard: I certainly do not want to infer, Your Honors, that this is a light question or that something that can be dealt with in any two or three weeks.

J. Bell: Everybody seems to be in a big hurry.

Mr. Dillard: We don't quarrel too much with the position of the other defendants to be put off for two years. If it is the opinion of the Court this should be put off for two years, why, we do not—we do not quarrel too much with that proposition.

J. Bell: Hasn't been much case made out for putting it off two and a half years. The only question before us is reapportionment. That is the only question before us.

Mr. Dillard: Yes, sir.

J. Bell: There's been some pretty good argument it ought to put off until January.

Mr. Dillard: I would think this question ought to, at least a proposal should be made prior to the November General Election. As you know, constitutional questions [fol. 202] are voted on in the General Election in our State, and it would be two more years before, under our present method of making amendments, you could really vote on a constitutional amendment. It would seem to me between now and the General Election in November that the General Assembly would have an opportunity and would have ample time to consider this question and come forward with a proposal that could be submitted to the people in November.

J. Bell: All right, sir.

COLLOQUY BETWEEN COURT AND COUNSEL

J. Tuttle: Mr. Shackelford.

Mr. Shackelford: If it please the Court, we think the State has put this entire problem in very sharp focus. It is clear from their argument, it is clear from their answers to questions from the Court that they wish this matter to be put off two and a half years.

We feel that it should not be put off at all. We feel that the time to do it, as was the case in 1962, is now.

We think the point in regard to the election laws and the constitutional aspects which have been raised and discussed today, the new Constitution, we think those elements are beyond the scope of our suit. On the other hand, we think they are matters of the gravest equity importance in considering the time factor.

Now, insofar as the ability of the Court to strike down these elements of the Constitution and to have this House [fol. 203] reapportioned, and to have the new elections, that is precisely what was done in three cases. It was done in Iowa in the Sinhorse (?) case; it was done in the

Sims case, the Alabama case that we are all familiar with; and it was done in the Sincock case in Delaware. All three of those are instances in which those mechanics were—

J. Bell: What are those Code Sections? Do you have them there?

Mr. Shackelford: The citations?

J. Bell: One is 47 and the other is in Title 2.

Mr. Shackelford: The citation of the Sinhorse case is—

J. Bell: No, no. I'm talking about the Code Sections. I don't care about the citations.

J. Tuttle: Providing for the organization of the General Assembly.

Mr. Shackelford: Oh, providing for the organization—

J. Bell: The apportionment section of the Constitution and the statute.

Mr. Shackelford: Yes. It is Article III—

J. Bell: Article II?

Mr. Shackelford: No.

J. Bell: Excuse me.

Mr. Shackelford: It's Article III, Section III, Paragraphs 1 and 2, a portion of Paragraph 2.

J. Bell: All right. And there is a statute on it also. [fol. 204] There is an apportionment statute—

Mr. Shackelford: Yes.

J. Bell: —in Title 47 to the Code. Let one of your— You have got plenty of assistants; let one of them look it up.

Mr. Shackelford: They are not assistants, Judge Bell. We are all co-equals.

J. Bell: They are not doing as much work as you are doing.

Mr. Shackelford: Yes; they are. You don't see the behind-the-scene activity. All co-equals.

J. Tuttle: I do know Mr. Lokey has never been an assistant to anybody.

Mr. Shackelford: He is a full partner in this representation, I assure you.

J. Tuttle: What is the Code Section?

J. Morgan: 34-1302, I believe, is the Code Section.

J. Bell: Thirteen lawyers and you don't know one Code Section.

Mr. Katz: 27-101.

Mr. Lokey: 47-101.

Mr. Shackelford: As Mr. Dillard said, thirteen and a half.

J. Bell: 47-101. That's good. Mr. Lokey is to be commended for his good work.

Mr. Lokey: Thank you, Judge.

Mr. Shackelford: We think that a malapportioned—con-[fol. 205] tinuation of a malapportioned House would have the most serious consequences, a malapportioned General Assembly in 1965 and '66, the 1965 and '66 Sessions. A very important appropriations bill will be passed then. It would be unfortunate if that will be passed by the last malapportioned General Assembly we have.

Other important laws will be adopted, and again if we are speaking of the last malapportioned Assembly, obviously it creates problems which it seems to us for every reason of practicality and justice should be avoided.

J. Bell: Well, now, speaking of the election code, I am not familiar with it, but the voting aspect of it, the voter registration—

Mr. Shackelford: Yes.

J. Bell: —it's too late to register to vote this fall, isn't it?

Mr. Shackelford: I believe the time schedule on that has passed.

J. Bell: Whatever is passed hasn't got a thing in the world to do with the election this fall, so far as the voter is concerned.

Mr. Shackelford: Not as far as registered voters are concerned, Judge Bell.

J. Bell: That's right.

J. Tuttle: Does it deal with how you conduct primaries? [fol. 206] J. Bell: I said voter qualifications.

Mr. Shackelford: Just voter qualification. Has nothing to do with that element, but, on the other hand, it has—

J. Tuttle: But that law becomes effective for the future.

Mr. Shackelford: Yes.

J. Tuttle: It will be effective next year.

Mr. Shackelford: Next year; that's correct.

J. Bell: Assuming it can't be changed before the election.

Mr. Shackelford: Mr. White advises me we understand that the election code would permit qualifications up to the 31st of July if the code is passed.

J. Tuttle: In other words, one of the provisions in either the House or Senate version does provide for further registration up to July?

Mr. Shackelford: The 31st; yes.

J. Bell: And you want to knock that out; you want to leave it like it is?

Mr. Shackelford: Well, insofar as we are concerned, Judge Bell—

J. Bell: You say that is the gravest matter of equity, I believe you called it. You want to stop that. You don't want people to register up to July the 31st? Is that an unfair position to put you in?

Mr. Shackelford: It—I think it is desirable, Judge Bell, for more people to register.

[fol. 207] J. Bell: I see.

Mr. Shackelford: I think it is desirable to encourage registration.

J. Bell: You would be in favor of the voter law, that part of it?

Mr. Shackelford: That part of it.

J. Bell: That element of it.

Mr. Shackelford: That element of it; yes, sir.

Insofar as this case is concerned and malapportionment is concerned, this Court is looking now at a House that has had the 3-2-1 formula for ninety-six years, since 1868, and we feel that that is a very long time. We feel that this malapportionment should be cured now. We feel the results we achieved two years ago and as the State itself admitted were most wise and most sound and they were done with proper expedition. And we feel this, Your Honors, in light of everything, that the time for it to be done is today.

And I would close with this statement of the Supreme Court in connection with the Alabama case, because it is so apt:

"Additionally, the Court below acted with proper judicial restraint after the Alabama Legislature had failed to act effectively in remedying the constitutional deficiencies in [fol. 208] the State's legislative apportionment scheme in

ordering its own temporary reapportionment plan into effect at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty and in prescribing a plan admittedly provisional in purpose so as not to usurp the primary responsibility for reapportionment which rests with the Legislature."

We hope and again urge in this instance the General Assembly will properly reapportion itself. If it doesn't, we again urge that this Court provisionally reapportion the House this year so we may proceed next year with a properly apportioned General Assembly.

Thank you very much.

J. Tuttle: This is a matter that obviously requires as prompt determination which is consistent with our giving prompt consideration to it. The Court cannot state how soon the decision will be made, but it will be announced just as soon as possible.

Mr. Wesberry, do you have counsel present in court who has asked to file a motion? Senator Wesberry, did you file a motion?

Senator Wesberry: Your Honor, my attorney filed a motion. He is not present; he is at other business. He can be present this afternoon.

[fol. 209] J. Tuttle: He can't be present if he isn't here now.

We will take it under advisement, if you would like for us to do so.

Senator Wesberry: Unless you would like for me to attempt to explain it.

J. Tuttle: Has it been served on counsel?

Court will stand in recess until further order.

(End of Proceedings.)

[fol. 210] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 211] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 7883

[Title omitted]

ORDER TO SHOW CAUSE—June 19, 1964

Following the publication of opinions by the United States Supreme Court on Monday, June 15, 1964, in the case of Reynolds v. Sims, et al, and companion cases dealing with the apportionment of seats in the Legislatures of the states of Alabama, New York, Maryland, Virginia, Delaware and Colorado, the plaintiffs have moved for further immediate relief to be made effective before the elections now scheduled to be held in November of this year to the General Assembly of the State of Georgia.

In our earlier order we held:

> "Viewing the extreme disparities existing in both Houses of the Legislature, against the background of the several factors which we have taken into consideration, we are forced to the conclusion that the present composition of the Georgia Legislature amounts to invidious discrimination against the plaintiffs and all others who are residents of the counties in which plaintiffs reside."

We then held that the Georgia Legislature as thus constituted was illegally apportioned so long as it was composed of two Houses, neither of which was apportioned according to population. We then said:

> "We do not find any authoritative decision by the Supreme Court that causes us to require that in order to give the plaintiff his constitutional rights the State Legislature must be constituted of two Houses, both of which are elected according to population.

". . . It is not necessary for us at this time to make a final determination on the question whether, if one House of the General Assembly of Georgia is elected according to population, the other House may remain *as completely unrelated to population ratios as it is today.*" (Emphasis added).

This Court then retained jurisdiction for the entry of such other and further orders as might be required.

[fol. 212] In its decision in the Reynolds case, the Court held that "as a basic constitutional standard, the Equal Protection clause requires that the seats in both houses of bi-cameral state legislatures must be apportioned on a population basis."

The Court added further that "the Equal Protection clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."

In our earlier order we especially noted the disparity of representation between the 1-vote and the 3-vote counties. This disparity appears at its most extreme dimensions by contrasting Echols County, which has one representative and a population of 1876, with Fulton County with its three representatives for 556,326 persons—one representative per 1,876 in Echols, as contrasted with 1 representative per 185,442 in Fulton, a disparity of approximately 100 to 1 as between the most populous and the least populous counties of the state.

It is thus plain to all that the present Legislature is constituted in such a manner as to violate the constitutional rights of the plaintiffs and the class which they represent. The question now posed by the present motion is: What is required to give the under-represented citizens of the State their legal due? There is then the further question: How quickly should this relief be granted?

With rare exceptions, the Courts declare the legal rights of the parties as of the time of the Courts' decisions. It is somewhat of a novelty in constitutional law for a court to find that a party is being deprived of constitutional rights, but that he is not entitled to immediate vindication of such rights. Well-known exceptions are the school desegrega-

tion cases, Brown et al v. Board of Education of Topeka, 347 U.S. 483, and 349 U.S. 294, and B. A. Reynolds etc., et al, v. M. O. Sims, et al, dec. June 15, 1964, 32 L.W. 4535, and companion cases decided this week. In Reynolds v. Sims the Court, after making it plain that each House of a bicameral legislature must be apportioned as nearly as [fol. 213] practicable in accordance with population, said:

> "It would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent, and a state's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles."

It is plain that the Supreme Court considered it to be the unusual case that would deny all relief to the underrepresented citizen who had brought his action sufficiently far in advance of an election to warrant the court's granting immediate relief. The respondent Secretary of State here contends that this is such an unusual case and that the court should not interpose any injunctive relief until after the State Legislature is given an opportunity at its regular session in 1965 to set its own house in order.

Under existing laws certain prospective candidates for election to the House of Representatives for Georgia have already met all of the party qualifications necessary to have their names on the ballot in the fall elections. Moreover, we are advised that the entry dates for qualification as candidates for the Democratic Party Primary have already been closed and entrance fees have already been paid. Although it would be physically possible for a time-

table to be devised under which an additional special session of the Georgia Legislature might be called into session and a reopening of the lists for qualifying new candidates could be arranged, and primaries could be held in time for a properly apportioned Legislature to be elected in November, 1964, the Court concludes that adequate protection of the rights of plaintiffs and their class can be afforded without so greatly interfering with the normal election procedures in this election year.

The Georgia Legislature is now in extraordinary session. It was called for limited purposes, and it is limited by law to consideration of the objects for which it was [fol. 214] called. Principal among these are (1) the adoption of new election laws, and (2) the proposing of a new State Constitution. In a very real sense these two Legislative objectives are of paramount interest to every resident of Georgia—much more so than the usual run of legislative acts of a session of the General Assembly. The reason for this is plain. The election laws that are under consideration will control the future elections in the state of Georgia, including the elections at which the members of the legally apportioned legislature are to be elected. As relates to the constitution, it will be the basic law of the state until and unless amended in the future. Such future amendment can be proposed only by a two-thirds vote of the two houses of a properly apportioned General Assembly.

Thus, we must necessarily decide whether it is consistent with the Supreme Court's mandate for the Court to stand aside and permit this improperly constituted legislative body to enact the new election code for the state, and also to perform legislative acts necessary to propose a new constitution for the state of Georgia. So far as the election laws are concerned, these would be readily subject to amendment or repeal by a simple majority of both houses of the properly apportioned General Assembly. However, the matter of the constitution presents a more serious problem. We emphasize the significance of this point, because of the Georgia constitutional policy, as expressed in the Georgia constitution since 1868, providing that a new constitution of the state of Georgia, if proposed by a constitu-

tional convention, *must be by a convention whose members are selected on the basis of population.*[1]

[fol. 215] There is no provision in the Georgia Constitution for the adoption of an entirely new constitution by action of the state Legislature followed by approval of the voters at a General Election. We recognize that, nevertheless, in 1945, this procedure was followed and the present special session of the General Assembly is pointing toward the same end. The validity of this procedure was brought in question after the election in 1945 was carried in favor of the new constitution. The Supreme Court of Georgia found that the new constitution was duly approved and in effect on reasoning which appears to have been based on the fact that once the election was held and the people approved the draft amendment, it could not be nullified or set aside. See Wheeler v. Trustees of Fargo District, etc., 200 Ga. 323, 37 S.E. 2d 322. The Georgia Supreme Court has not held that the legislature has the power to propose a new constitution for adoption in the manner in which it proceeded in 1945 and in the manner in which the present session of the legislature is proceeding. It appears that such procedure is in conflict with the basic principle announced in the Georgia constitution to the effect that the adoption of a new constitution must be the work of a constitutional convention constituted by representatives of the people based on population "as near as practicable."

Thus, while we feel it appropriate in the exercise of the judicial function to permit the General Assembly to reapportion itself, since the guidelines now established by the Supreme Court are plain and simple, we do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as is the case here, proposed under conditions of doubtful legality by a malapportioned legislative body.

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[1] The Georgia Constitution provides, Sect. 2-8102: "No convention of the people shall be called by the General Assembly to revise, amend, or change this Constitution, unless by the concurrence of two-thirds of all members of each House of the General Assembly. *The representation in said convention shall be based on population as near as practicable . . .*" (Emphasis added).

An accommodation between the relief which would permit the Legislature to reapportion itself, and yet which would leave to such reapportioned Legislature the performance of its legislative duty looking towards the adoption of a new constitution, can, we think, be accomplished by our entering an order along the following lines:

(1) The provisions of Article III, Sec. III, paragraph 1, of the Constitution of the State of Georgia of 1945, (Ga. [fol. 216] Code 2-1501), are void because they are in conflict with the Fourteenth Amendment to the Constitution of the United States.

(2) The provisions of Georgia Code Section 47-101, as amended (Acts 1921, p. 229; 1931, p. 48; 1941, p. 348; 1951 pp. 26-27; 1953 pp. 10-11; and 1961 p. 111) are void because they are in conflict with the Fourteenth Amendment of the Constitution of the United States.

(3) The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted.

(4) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that the service of the members of the General Assembly of the state of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 45-day session, as provided in the Georgia constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements, and as may be necessary to permit the holding of elections to the newly constituted General Assembly.

In order that the Court may be fully apprised of the effect which such an order would have on the proper functioning of the state government, and the holding of the elections this year, it is

Ordered that the defendants show cause, if any they have, on the 24 day of June, 1964, at 2:00 P.M., why the foregoing order should not be entered by this Court.

This 19th day of June, 1964.

Elbert P. Tuttle, United States Circuit Judge.

Griffin B. Bell, United States Circuit Judge.

Lewis R Morgan, United States District Judge.

[fol. 217]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 7883

[Title omitted]

NOTICE OF MOTION—Filed June 23, 1964

To: Francis Shackelford, Attorney for Plaintiffs; George P. Dillard, Attorney for Mrs. Katherin E. Mann, Ordinary of DeKalb County, Georgia; James M. Sibley, Attorney for Eugene Gunby, Ordinary of Fulton County, Georgia; and Eugene Cook, Attorney for Ben W. Fortson, Jr., Secretary of State and Carl E Sanders, Governor, State of Georgia.

You are hereby notified that the above and foregoing motion will be brought on for hearing before a Three-Judge District Court of the United States for the Northern District of Georgia on Wednesday afternoon, June 24, 1964, at 2:00 p.m.

This June 23, 1964.

Denmark Groover, Jr., Of Counsel for Movants.

[fol. 218] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 7883

[Title omitted]

MOTION TO INTERVENE OR IN THE ALTERNATIVE TO APPEAR AS AMICUS CURIAE—Filed June 23, 1964

Comes now Frank S. Twitty, Denmark Groover, Jr., Wilson Brooks, Joe C. Underwood, Thomas B. Murphy, James W. Paris, Wilson B. Wilkes, B. Shaw Abney, John W. Acree, Henry B. Allen, John H. Anderson, Jr., B. Frank Arnsdorff, George T. Bagby, Mac Barber, Leon H. Baughman, James E. Beck, W. Randall Bedgood, Jr., John C. Bell, J. Lucius Black, William E. Blair, D. B. Bialock, Edgar Blalock, Arthur K. Bolton, Ralph W. Bowen, Rooney L. Bowen, A'Delbert Bowen, J. O. Brackin, Warren F. Branch, Hines L. Brantley, George B. Brooks, M. Parks Brown, George D. Busbee, J. T. Byrd, Johnnie L. Caldwell, Tom C. Carr, Troy Causby, Philip M. Chandler, Joe T. Clark, Harold B. Clarke, Grady N. Coker, Roy N. Coker, J. Willis Conger, J. R. Cullens, Truitt Davis, Nathan D. Dean, H. Dorsey Deen, Joe L. Dennard, Harry D. Dixon, A. C. Dorminy, Jr., J. Ebb Duncan, A. C. Duncan, T. B. Echols, James H. Floyd, Wales T. Flynt, J. W. Fowler, Ed Fulford, W. J. Gibbons, William B. Greene, R. A. Griffin, Maddox J. Hale, H. Goodwin Hall, A. Hewlet'e Harrell, J. Floyd Harrington, Waldo Henderson, Curtis C. Herndon, Render Hill, N. Dudley Horton, Jr., Francis Houston, Joe J. Hurst, Joe Isenberg, A. S. Johnson, Sr., B. W. Johnson, Charles M. Jones, Fred C. Jones, Jr., Milton Jones, J. E. Jordan, Haygood Keadle, Roy R. Kelly, James W. Keyton, William R. Killian, H. E. Kirkland, W. D. Knight, D. W. Knight, William E. Laite, Jr., W. Jones Lane, William J. Lee, Grover B. Lee, William S.

Lee, Gerald H. Leonard, E. Brooks Lewis, William R. Lind-
[fol. 219]sey, B. C. Logan, Sr., Leonard N. Lokey, Sidney Lowrey, Chappelle Matthews, Dorsey R. Matthews, Ralph McClelland, J. Roy McCracken, Thomas J. McDonald, Jr., Henry G. McKemie, William T. Meeks, Quimby Melton, Jr., C. Patrick Milford, Henry R. Milhollin, Marvin E. Moate, J. Harvey Moore, Handsel Morgan, Jack H. Morgan, Paul E. Nessmith, Sr., David L. Newton, A. Sid Newton, Howard T. Overby, Robert C. Pafford, H. Walstein Parker, Henry F. Partridge, Henry N. Payton, Eldridge W. Perry, David C. Peterson, G. S. Phillips, Mac Pickard, W. K. Ponsell, Will Poole, Marion T. Pope, Jr., Edwin C. Poss, Howard Rainey, Louis T. Raulerson, Henry L. Reaves, J. R. Rhodes, Jr., Corbin C. Roberts, H. Ben Rodgers, Jimmie Rogers, Allen P. Roper, Emory L. Rowland, Henry P. Russell, Jr., John C. Scarborough, Jr., J. W. Sewell, Jack W. Shuman, J. Grover Simmons, Mackie Simpson, J. Paul Sinclair, Charles C. Smith, George L. Smith, II., A. C. Smith, Richard R. Smith, E. B. Smith, Jr., Wayne Snow, Jr., Harry R. Spikes, Paul Stalnaker, William B. Steis, Earl P. Story, Ernest W. Strickland, Buck Tabb, W. G. Todd, William M. Towson, M. King Tucker, Joe B. Tucker, Ray M. Tucker, Ralph R. Underwood, Clarence R. Vaughn, Jr., Fred H. Walker, J. Crawford Ware, Caleb P. Watson, Jesse C. Watts, Hubert H. Wells, D. Warner Wells, Daniel H. White, William S. Wiggins, George J. Williams, W. M. Williams, Hoke S. Wilson, Joe M. Wilson, Bailey Woodward and Floyd Hudgins, as members of the House of Representatives of the General Assembly of Georgia, move for leave to intervene in the above stated case or to be heard as amicus curiae therein, and by way of grounds therefor respectfully shows to the Court as follows:

1.

Movants are members of the House of Representatives of the General Assembly of Georgia, constituting 171 of a total membership of 205. On the date on which authority was obtained to file this motion there were only 195 members in attendance, thus movants constitute 171 of a total of 195 present, or 87.69% of the membership present.

2.

One hundred and nine of the members have been nominated as Democratic candidates for the same office for the [fol. 220] November 1964 election, and verily believe that they will be elected therein.

3.

On May 4, 1964, movants, together with the other members of the House and Senate, convened at the call of the Governor, Carl E. Sanders, in special session.

4.

For over seven weeks now movants, and the others, have been engaged in attempting to draft a proposal for a new Constitution to submit to the voters of this State in the general election of 1964.

5.

Movants' service have been at great personal sacrifice to each, and they allege that their sole desire was to serve all the electorate of this State.

6.

The cost of such session has to date exceeded $1 million in tax funds.

7.

Movants allege that the House of Representatives by a vote of 166 to 6, and the Senate by a vote of 48 to 0, adopted drafts of a proposed new Constitution which even though different versions indicates a desire on the part of the entire General Assembly to submit to the people a new proposed Constitution for their consideration.

8.

Movants further show that at the time this petition is drawn that the Conference Committee of each body are at work and it is expected that a report will be submitted

to the respective bodies by the time of the filing of this motion or shortly thereafter.

9.

Movants allege that in the proposal there are provisions covering areas which, if adopted by the people, would permit a much needed improvement in those areas, and par- [fol. 221] ticularly in the urban area, for example, a provision to permit participation by the State in a mass transportation system, a provision providing substantial aid to cities for street and road construction, for the first time in history a provision for workable home rule to cities and counties, and provisions permitting judicial reforms.

10.

The proposal to be submitted cannot become effective until and unless approved by a majority of the voters of this State voting in such election and in which each vote is of equal weight.

11.

Movants allege on behalf of those who will return, and they verily believe on behalf of others yet to be elected, that in the 1965 session of the Georgia General Assembly there will be no difficulty in getting such reapportionment legislation adopted as will be necessary to comply with the Fourteenth Amendment to the United States Constitution as that Amendment is now interpreted by the Federal Courts.

12.

Movants allege that prior to June 15, 1964, no one could say with certainty that a new constitutional doctrine of State legislative composition would evolve, as witness the dissenting opinions in the cases establishing such doctrines.

13.

Movants allege that they are all of the Representatives from areas of Georgia inhabited by 2,006,930, and addi-

tionally are some of the Representatives from areas of Georgia with a total population of 1,234,965; thus movants represent in whole or in part a total of 3,241,895 people out of a total population, according to the 1960 census, of 3,943,116.

14.

Movants further allege that in order for the proposal to be submitted to the people of Georgia, that a sufficient number of persons will have to vote therefor who will be representative of a minimum of 1,691,130 people. How-
[fol. 222] ever, movants allege that such number of votes would come from persons representing a much larger population.

15.

Movants further allege that to now prohibit the placing of such proposal on the November ballot would destroy a large part of the effort and work of the General Assembly and would cause a substantial loss to the taxpayers of Georgia.

16.

Movants further allege that for this Court to prohibit the proposal to be placed on the ballot would amount to a judicial determination that any proposal thus submitted would be incompatible with the interests of the people of the State of Georgia without giving them an opportunity to make their own expression thereon, and we respectfully submit would be an abuse of discretion on the part of this Court.

Wherefore, movants pray that: (a) They be granted leave to intervene, or in the alternative to be heard, in connection with the Rule Nisi issued on June 19, 1964, to be heard on the 24th of June, 1964.

Frank S. Twitty, Denmark Groover, Jr., James W. Paris, Thomas B. Murphy, Pro se and as Attorneys for Movants.

[fol. 223] Certificate of Service (omitted in printing).

[fol. 224] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 7883

HENRY J. TOOMBS, et al., Plaintiffs,

vs.

BEN W. FORTSON, JR., as Secretary of the State of Georgia, et al., as Defendants.

CITY OF ATLANTA'S AMICUS CURIAE MOTION TO MODIFY ORDER OF JUNE 19, 1964—Filed June 24, 1964

Now Comes the City of Atlanta, a municipal corporation of the State of Georgia, and upon leave being granted to file this motion, shows as follows:

1.

That due to the general public concern of the City of Atlanta in many phases of a proposed New Constitution for the State of Georgia in the fields of rapid transit, home rule, public finance, and others, it is respectfully moved that this Court modify its Order of June 19, 1964 to the extent of making a determination ancillary to the Court's Order of June 19, 1964 as to whether or not Articles or Articles and Sections of a proposed Constitution could be presented as separate amendments to Articles or Articles and Sections of the Constitution for the people of the State of Georgia to reject or approve in the General Election in November, 1964, as per Article XIII, Section 1, Paragraph 1 of the Constitution of the State of Georgia (Proclaimed August 13, 1945).

[fol. 225]

2.

That this Court enlarge its order of June 19, 1964, due to the vital effect the proposed revisions have on the people of the City of Atlanta and the State of Georgia, to furnish clarification to the Defendants of the manner in which said Defendants may submit proposed constitutional revisions to the electors of the State of Georgia for ratification or rejection in the General Election of November, 1964.

3.

That due to the need for many revisions in the present Constitution, and due to the time element involved in presenting such revisions to the voters of the State, and the delay that will necessarily follow if same is not presented in November, 1964, this Court is respectfully requested to indicate the legality of the presently constituted General Assembly of the State of Georgia setting up a Constitutional Convention and to further determine the manner, by election or appointment, the members thereof could be selected under present Article XIII, Section 1, Paragraph 2 of the Constitution of the State of Georgia (Proclaimed August 13, 1945).

Wherefore, Movant prays that its motion be considered.

Henry L. Bowden and Lewis R. Slaton, Attorneys for the City of Atlanta, 1114 William-Oliver Building, Atlanta, Georgia 30303, Ja. 4-7731.

[fol. 226]

ORDER—June 24, 1964

The City of Atlanta, a municipal corporation of the State of Georgia, is hereby granted leave to file the within motion in the foregoing case. Let counsel for plaintiffs and defendants in the foregoing case be served with a copy of this motion and order.

This 24th day of June, 1964.

Griffin B. Bell, United States Circuit Judge.

[fol. 227] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 7883

[Title omitted]

RESPONSE TO SHOW CAUSE ORDER OF THE COURT DATED JUNE 19, 1964, ON BEHALF OF DEFENDANTS OTHER THAN DEFENDANTS GUNBY AND MANN—Filed June 24, 1964

Come now defendants, other than defendants Gunby and Mann, and by way of response to the show cause order of June 19, 1964, say as follows:

1.

Responding to paragraphs 1 and 2 of the proposed order, declaring unconstitutional the constitutional and statutory provisions governing apportionment of the House of Representatives of the General Assembly of Georgia, these defendants show that the immediate invalidation of these provisions without more will leave the state without constitutional or statutory authority of any nature under which to conduct primary and general elections for members of the House of Representatives in 1964. These defendants therefore urge that if these aforesaid provisions are to be declared void, such judgment and decree be withheld until later date, so as to remove any cloud upon the validity of the 1964 primary and general elections for members of the House of Representatives.

2.

Responding to paragraph 3 of the proposed order, these [fol. 228] defendants respectfully submit that said paragraph should not be made effective for the following reasons:

(a) Defendants show that the General Assembly of Georgia is presently in extraordinary session and has been so for the last seven weeks, dealing primarily with preparation of a proposed new constitution which will be submitted to the people for ratification or rejection at the General Election in November, 1964; that said constitution was completed and passed by the requisite two-thirds majority of both houses on June 23, 1964; that in addition, a resolution calling a constitutional convention to convene shortly after adjournment of the present legislative session was introduced in the General Assembly on June 23, 1964, a copy of said proposed resolution being attached hereto and made a part hereof as "Exhibit A"; that said resolution provides for the representation in said convention to be based on population in accordance with Article XII, Sec. I, Par. II (§2-8102) of the Constitution of Georgia; that the proposed new constitution to be approved by the General Assembly now in session will be submitted to said constitutional convention for its consideration, revision and approval prior to submission to the people for ratification in the 1964 November General Election; that such procedure comports not only in every respect with the existing constitution of Georgia, but also insures that the final proposal submitted to the people will have been first approved by a constitutional con- [fol. 229] vention based on population; that for this court to enjoin the submission of a new constitution in November, 1964, will effectively preclude further constitutional revision until the 1966 General Election, and in the meantime, urban renewal, rapid transit and other urgent problems important to the State generally and to the centers of urban population in particular will remain unsolved; whereas, the proposed constitution grants broad powers over such matters to the political subdivisons of the State.

(b) These defendants respectfully deny the authority of this Court to enjoin the law-making process of a state while in progress; that the judicial power of the United States does not extend thereto for the rea-

sons (1) That such authority is not delegated to the United States by the Constitution thereof, and is thereby denied to the United States by the Tenth Amendment to the Constitution of the United States, and (2) The Congress has not undertaken to delegate such power and jurisdiction to the federal district courts by statute or otherwise; (3) That such order is in effect an attempt to enjoin the members of the General Assembly with respect to matters purely legislative and law-making in character, as to which legislators are immune from suit under the Civil Rights statutes; (4) That such order deals with a subject matter political in nature and therefore non-justiciable; and (5) Such order is in effect the granting of relief against the state prohibited by the Eleventh Amendment. Insofar as said order purports to be based upon [fol. 230] an interpretation of the Georgia constitutional provisions governing amendment procedures, said order is directly contrary to a decision of the Supreme Court of Georgia, binding on this court as to all state-law questions, in *Wheeler* v. *Trustees of Fargo School District*, 200 Ga. 323. Defendants further say that any proposed amendment to the Constitution of Georgia can not become effective until and unless approved by a majority of the qualified voters of Georgia voting in the November general election, in which the votes of all voters have and are accorded the same weight. Lastly, defendants say that the effect of said order is to deprive the State, until 1966, of an opportunity to amend the Constitution of Georgia so as to substitute new provisions in Article III authorizing reapportionment of the House of Representatives on a basis of substantial population equality in accordance with federal constitutional standards.

3.

Responding to paragraph 4 of the proposed order, defendants show that the language thereof, in referring to "General Assembly," seemingly raises question as to the constitutionality of composition of the State Senate as well as the House of Representatives.

Wherefore, having responded, defendants pray that the proposed order be amended in accordance with the observations hereinbefore set forth.

Eugene Cook, Attorney General, Judicial Building, 40 Capitol Square, Atlanta, Georgia;

E. Freeman Leverett, Deputy Assistant Attorney General, 25 Thomas Street, Elberton, Georgia.

[fol. 231] Certificate of Service (omitted in printing).

[fol. 232]

EXHIBIT "A" TO RESPONSE

A BILL

TO BE ENTITLED

An Act to provide for a convention of the people of Georgia for the purpose of revising, amending or changing the Constitution of this State; to provide the manner, method and procedure for the calling of such convention; to provide for delegates; to provide for funds; to provide for the submission of any proposed revision, amendment or change in the Constitution; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. That immediately upon the passage of this Act, with the concurrence of two-thirds of all members of each house of this General Assembly, His Excellency, the Governor, be and he is hereby authorized and required to issue his Proclamation for the call of a convention of the people of Georgia to convene at the Capitol, in the City of Atlanta, on the 30th day of June, 1964, and from day to day, thereafter, for the purpose of revising, amending or changing the Constitution of this State.

Section 2. That His Excellency, the Governor, be and he is hereby authorized and required to select and appoint

the delegates to said Convention from each State Senatorial District based on the population of each said District, as now arranged, in the ratio of one delegate to every 40,000 inhabitants of said Senatorial Districts, or major fraction thereof, according to the United States Decennial Census of 1960.

Section 3. The delegates to the convention shall receive the same compensation, per diem, expenses and allowances authorized for members of the General Assembly meeting in regular session. All funds necessary to effectuate the purposes of this Act shall come from the funds appropriated to the Legislative Branch of Government and from any other appropriations or available funds.

Section 4. The revision, amendment or change in the [fol. 233] Constitution of this State as adopted by the aforesaid convention shall not become effective until the proposed revision, amendment or change has been submitted to and ratified by the people in the manner provided for the submission and ratification of amendments proposed by the General Assembly.

Section 5. When the proposed revision, amendment or change in the Constitution of this State shall have been agreed to by the delegates to the aforesaid Convention and the same has been entered on their Journal with "Ayes" and "Nays" taken thereon, such proposed revision, amendment or change shall be published and submitted as provided in Article XIII, Section I, Paragraph I of the Constitution of Georgia of 1945, as amended.

The ballot submitting the proposed revision, amendment or change in the Constitution of this State shall have written or printed thereon the following:

"For ratification of the revision, amendment or change in the Constitution of this State as proposed by the Constitutional Convention of the people called by the General Assembly.

"Against ratification of the revision, amendment or change in the Constitution of this State as proposed by the Constitutional Convention of the people called by the General Assembly."

All persons desiring to vote in favor of adopting the proposed revision, amendment or change in the Constitution of this State shall vote for ratification of said revision, amendment or change, and all persons desiring to vote against the adoption of the proposed revision, amendment or change shall vote against ratification.

If such revision, amendment or change in the Constitution of this State as proposed by the Constitutional Convention shall be ratified as provided in Article XIII, Section I, Paragraph I of the Constitution of Georgia of 1945, as amended, it shall be the revised, amended or changed Constitution of this State as adopted by the Constitutional Convention called by the General Assembly.

The returns of the election shall be made in like manner as returns for election for members of the General Assembly and it shall be the duty of the Secretary of State to ascertain the result and certify the result to the Governor who shall issue his Proclamation thereon.

[fol. 234] Section 6. All laws and parts of laws in conflict with this Act are hereby repealed.

[fol. 235]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 7883

[Title omitted]

DEFENDANT'S PROPOSAL FOR ORDER ON PLAINTIFFS' MOTION FOR FURTHER RELIEF—Filed June 24, 1964

1. Article III, Sec. III, Par. 1 (Code §2-1501) of the Constitution of Georgia, and Section 47-101 of the Code of Georgia, as amended, are hereby declared to be prospectively void, null and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States, and defendants are hereby enjoined from conducting any elections thereunder; provided however, nothing herein shall prevent the nomination and election

of members of the House of Representatives under said provisions in 1964 to take office at the regular session of the General Assembly which convenes in January 1965, and to serve subject to limitations hereinafter specified.

2. The motion of plaintiffs for further injunctive relief prior to the 1964 primary and general elections for members of the House of Representatives is hereby denied at this time, without prejudice to the right of plaintiffs to apply to this court for further relief should the General Assembly which convenes in January 1965, adjourn in said year without having enacted legislation providing for (a) reapportionment of the House of Representatives on [fol. 236] a basis of substantial equal population in accordance with federal constitutional requirements, and (b) the holding of special primary and general elections for the House of Representatives during 1965 on such reapportioned basis, for members to take office immediately and serve the remainder of the unexpired term.

3. Nothing herein shall be construed as prohibiting, (although not requiring) the reapportionment of the House of Representatives by the General Assembly by legislation or otherwise, enacted during an extraordinary session of the General Assembly in 1964, providing for reapportionment of the House of Representatives of the General Assembly elected in the 1964 November General Election and which takes office in January 1965.

4. (With respect to paragraph 3 of the proposed order, defendant's position is that such an order is not warranted under any circumstances, but in the event the Court decides otherwise, we respectfully urge that the Court frame its said order in terms of an injunction, so as to preclude any troublesome questions of defendant's right to a direct appeal under 28 U.S.C.A. 1253.)

5. This court reserves jurisdiction to enter such further orders and grant such further relief as may be required from time to time.

Respectfully submitted,

Eugene Cook, The Attorney General; E. Freeman Leverett, Deputy Assistant Attorney General.

[fol. 237] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 7883

[Title omitted]

SUPPLEMENT TO COMPLAINT—Filed June 24, 1964

Plaintiffs in the above-styled action respectfully show to the Court that:

1. Since their original complaint was filed on April 4, 1962, and since this Court rendered its opinion and order on May 25, 1962, which opinion and order was subsequently clarified and supplemented, the Supreme Court, on June 15, 1964, rendered decisions holding in substance that as a basic constitutional standard the seats in both Houses of bicameral state legislatures must be apportioned on a population basis.

2. On June 17, 1964, plaintiffs moved this Court for further consideration and additional relief.

3. The General Assembly of Georgia is presently convened in extraordinary session for the purpose of proposing a new state constitution for ratification in the general election of November 3, 1964. The adoption of a new constitution before the General Assembly is apportioned [fol. 238] in accordance with constitutional standards will result in irreparable injury to the plaintiffs and the class of under-represented citizens of Georgia whom they represent.

Wherefore, plaintiffs pray that in addition to the relief heretofore sought:

(a) They have leave to file and serve this supplemental pleading under Rule 15(d), Federal Rules of Civil Procedure;

(b) Defendants be enjoined from placing on the ballot to be used in the general election to be held on November 3, 1964, or any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question of whether a new constitution should be ratified;

(c) That plaintiffs have such other and further relief as the Court may deem just and equitable.

Francis Shackelford, An Attorney for Plaintiffs and Representative of the other Attorneys for Plaintiffs, viz., Hamilton Lokey, Joseph B. Cumming, Edward S. White, Isreal Katz, William B. Gunter, A. R. Kenyon, J. Quentin Davidson, Albert P. Reichert, John E. Simpson, Raymond M. Reed, John W. Sognier, Emmet J. Bondurant, 12 Floor, Citizens & Southern National Bank Bldg., Atlanta 3, Georgia, Tel. 524-3241.

[fol. 239] [File endorsement omitted]

ORDER—June 24, 1964

Let the foregoing *Supplement to Complaint* be filed, subject to objection, and served on the attorneys of record for defendants.

This 24 day of June, 1964.

Elbert P. Tuttle, United States Circuit Judge.

[fol. 240] Certificate of Service (omitted in printing).

[fol. 241] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 7883

HENRY J. TOOMBS, et al., Plaintiffs,

v.

BEN W. FORTSON, JR., as Secretary of the State of Georgia, et al., Defendants.

ORDER—June 24, 1964

The Court having heard oral argument on the order to show cause entered by it on the 19th day of June, 1964, and being advised in the premises,

It is now Ordered, Adjudged and Decreed as follows:

(1) Article III, Section III, Paragraph I (Code Section 2-1501) of the Constitution of Georgia of 1945, and Section 47-101 of the Code of Georgia, as amended, are hereby declared to be prospectively null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States, for elections to the House of Representatives after the General Election to be held in November, 1964.

(2) The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held [fol. 242] on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted; provided, however, nothing in this order shall prevent the submission of amendments to the Constitution of the state of Georgia

which are separate as to subject matter, in accordance with Article XIII, Section I, Article 1, of the Constitution of the state of Georgia, 1945. (See Hammond v. Clarke, 136 Ga. 313, for a discussion by the Georgia Supreme Court of what constitutes separate amendments.) Nor shall anything in this order prevent the calling by the General Assembly of a "convention of the people to revise, amend or change the constitution" if the representation "in the convention is based on population as near as practicable" with the members being elected by the people (see Article XIII, Section I, Article 2). Constitution of the State of Georgia, 1945.

(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that the service of the members of the General Assembly of the state of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 45-day session, as provided in the [fol. 243] Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements, and as may be necessary to permit the holding of elections to the newly constituted General Assembly.

The Court will retain jurisdiction of this cause for such other and further orders as may be necessary.

This 24th day of June, 1964.

Elbert P. Tuttle, United States Circuit Judge; Griffin B. Bell, United States Circuit Judge; Lewis R. Morgan, United States District Judge.

[fol. 244] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 7883

[Title omitted]

MOTION OF PLAINTIFFS TO MODIFY ORDER OF JUNE 24, 1964— Filed June 26, 1964

Now come the plaintiffs in the above entitled matter and move the Court to modify its order of June 24, 1964, so that paragraphs (1) and (3) of said order will read as follows:

"(1) Article III, Section III, Paragraph I (Code Section 2-1501) of the Constitution of Georgia of 1945, is hereby declared to be null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States.

Section 47-101 of the Code of Georgia, as amended, is hereby declared to be prospectively null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States, for elections to the House of Representatives after the General Election to be held in November of 1964."

[fol. 245] "(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that notwithstanding anything in Article III, Section IV, Paragraph I (Code Section 2-1601) of the Constitution of Georgia of 1945 to the contrary, that the service of the members of the House of Representatives of the General Assembly of the State of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session, as provided in the Georgia Constitution, including such legisla-

tion as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements and as may be necessary to permit the holding of elections to the newly constituted General Assembly, said elections to be held at such times as may be necessary to permit the Members of such General Assembly to take office as soon as practicable, but in no event later than the second Monday in January, 1966."

Wherefore, plaintiffs pray that this court modify its order of June 24, 1964 accordingly.

Francis Shackelford, An Attorney for Plaintiffs and Representative of the other Attorneys for Plaintiffs, viz. Hamilton Lokey, Joseph B. Cumming, Edward S. White, Israel Katz, William B. Gunter, A. R. Kenyon, J. Quentin Davidson, Albert P. Reichert, John E. Simpson, Raymond M. Reed, John W. Sognier, Emmet J. Bondurant, 12th Floor, Citizens and Southern National Bank Bldg., Atlanta 3, Georgia, 524-3241.

[Handwritten notation—Consent, Eugene Cook, Attorney General.]

[fol. 246] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 7883

HENRY J. TOOMBS, et al., Plaintiffs,

v.

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, et al., Defendants.

STIPULATION OF PARTIES—Filed June 29, 1964

It is hereby stipulated by and between the parties hereto, acting through their counsel of record, that the following

facts shall be taken as true at the trial of this case without the necessity of introducing any further evidence with respect thereto, but this stipulation does not constitute an agreement by the parties as to the relevancy of any facts stipulated herein. All of the facts stipulated herein, even though some are stated in the present tense, are deemed to be true and correct as of June 24, 1964. It is further agreed that the parties may introduce other evidence, providing the same is not contradictory to the facts stipulated herein.

1.

The official rules of the Republican State Executive Committee adopted June 8, 1964, applicable to the nomination of candidates for election to the Georgia House of Representatives in the November 3, 1964 General Election are fully and accurately set forth in Exhibit A which is attached hereto.

2.

The official rules of the State Democratic Executive Committtee, adopted March 31, 1964, applicable to the nomina-
[fol. 247] tion of candidates for election to the Georgia House of Representatives in the November 3, 1964 General Election are fully and accurately set forth in Exhibit B which is attached hereto.

Francis Shackelford, An Attorney for Plaintiffs and Representative of the other Attorneys for Plaintiffs.

Eugene C. Cook, Attorney General; E. Freeman Leverett, Assistant Attorney General.

[fol. 248]

EXHIBIT "A" TO STIPULATION

RULES OF THE REPUBLICAN PARTY

1. That candidates of the Republican Party for election to public office in the General Election to be held November 3, 1964 shall be nominated in the following manner:

(a) Party nominees for United States Senate, Justices of the Supreme Court, Judges of the Court of Appeals, Judges of Superior Court, Solicitor Generals of the Superior Court, State House Officers, and Senators from the various State Senatorial Districts shall be nominated by the State Committee.

(b) Party nominees for Representative to the Congress of the United States shall be nominated by the appropriate Congressional District Executive Committee.

(c) Members of the House of Representatives of the Georgia General Assembly, County and Militia District Officers and Municipal Officers shall be nominated by the appropriate County Executive Committee.

Notwithstanding the foregoing, any Committee which hereinabove is authorized to nominate party nominees may, in its discretion, conduct a primary election for the purpose of nominating any one or more of the nominees which it has the power to nominate.

2. Any primary held under the provisions of Paragraph 1 shall be held on September 9, 1964. The entries for such primary shall be open at noon on June 15, 1964 and close at noon on July 24, 1964, Eastern Standard Time.

3. Any Republican Primary Election shall be conducted in accordance with the laws of this State and the customs of the Party, insofar as these customs do not conflict with existing laws and these rules. All duly registered electors are qualified to vote in said primary.

The County Executive Committee of the Party holding the Primary in each county or the managers in charge of the Primary election are hereby empowered to decide whether or not a person offering to vote is qualified under the provisions of this rule.

4. It shall be the duty of the Republican Executive Committee of each county to select and properly advertise the legal place or places of voting; to select, or provide for selecting capable managers and clerks for conducting the Primary and administer the oaths to them; to furnish said managers a list of all registered and qualified voters in the

respective districts; to see to printing and proper distribution of all necessary blanks and ballots; and to make all other necessary arrangements for holding such primary election in their respective counties. In selecting managers and clerks, they shall, so far as practicable give recognition to all candidates. The polls shall be open at 7 o'clock A. M., Eastern Standard Time, and close at 7 P. M., Eastern Standard Time, except where otherwise provided by local laws.

5. Before the name of a candidate shall be certified to the superintendent of a primary he shall have met the following qualifications:

(a) He shall be a registered voter.

(b) He must pay the qualification fee hereinafter prescribed.

(c) He must not have been convicted of any felony or of any crime involving moral turpitude under the laws of this State or any other State or of the United States.

(d) He shall have the approval of the Executive Committee conducting the Primary. Each Executive Committee shall adopt such reasonable rules as may seem to it appropriate for the obtaining of said approval.

(e) Any prospective candidate dissatisfied with the ruling of any Executive Committee shall, within three (3) days of said ruling, have the right of appeal to the State Executive Committee and the decision of the State Executive Committee or its Special Primary Subcommittee, which decision shall be made within five (5) days, shall be final.

[fol. 249] 6. In order for any candidate to be declared the nominee by Primary election, he shall have received the majority votes cast in said election. If there are more than two candidates in any primary and no candidate receives a majority of the popular votes cast, there shall be a second primary, and the two candidates receiving the highest number of votes in the first Primary shall be the candidates in the second Primary. The candidates receiving a majority of the votes cast in the second Primary shall be the Party nominee. In the event it becomes neces-

sary to hold a second Primary, it shall be held on September 23, 1964.

7. Any District or County Executive Committee conducting a primary under these rules, may adopt such other rules and regulations for the conduct of such primary and the qualification of candidates, as it may seem appropriate, provided said rules are not in conflict with the law or with these rules.

8. The County Republican Executive Committee of each county wherein a primary has been held on the second Wednesday in September shall on the second Thursday of September, at 10:00 A. M., Eastern Standard Time meet at the courthouse in said county, canvass and declare the result as shown by the returns made by the various election managers. The Chairman of each County Committee shall certify the results and transmit same to the Secretary of the State Republican Executive Committee immediately. The Chairman and Secretary of the State Republican Executive Committee shall consolidate and publish these results of said Primary as shown by the returns certified by the various County Chairmen and shall certify the names of all party nominees to the proper officials as provided by law.

In the event of a second primary, the County Executive Committee shall meet on the day after said primary and canvass and declare the results as provided above.

9. In the event of any contest of the result of any primary or arising out of any primary, the State Executive Committee shall hear such contest and shall determine the winner of said primary in accordance with procedures which it shall establish for the purpose of hearing of said contest, which procedures shall provide for a notice and hearing to the parties concerned.

10. The State Chairman is hereby authorized to appoint a subcommittee to be known as the Special Primary Subcommittee which shall be composed of the Chairman and five members of the State Republican Executive Committee named by the Chairman. In the event of a change in the law making a change in these rules necessary, and it is not

feasible to convene the entire Executive Committee, the said Subcommittee is authorized to amend these rules and make such other rules and regulations as it in its discretion may deem advisable.

11. Any person dissatisfied with any decision of the local, County or District Committee, shall have the right of appeal to the State Executive Committee. The State Executive Committee or the Special Primary Subcommittee, in the event it is not feasible to convene said State Executive Committee, shall have the right to determine said issue in accordance with law and these rules and the customs of the Party.

12. Entrance fees for candidates for nomination by primary for the various officers are assessed as follows:

Justices of the Supreme Court	$1,000.00
Judges of the Court of Appeals	$1,000.00
Public Service Commissioner	$1,000.00
United States House of Representatives	$ 750.00
Judges of the Superior Courts	$ 750.00
Solicitors General of the Superior Courts	$ 500.00
State Senators	$ 500.00

[fol. 250] County Committees shall set entrance fees for County offices and members of the State House of Representatives and local offices.

13. Candidates for the United States House of Representatives shall pay fees to such person as may be designated by the District Committee. Candidates for county offices and candidates for the State House of Representatives shall pay such fees as the County Executive Committee shall determine and in such manner as said Committee shall determine.

Candidates for the United States Senate, State House Offices, Justices of the Supreme Court, Judges of the Court of Appeals, Public Service Commission, State Senators, Judges and Solicitors General of the Superior Courts shall pay said fees to the Chairman or Secretary of the State Republican Executive Committee or their authorized representatives at one of the State offices.

No other assessments or qualification fees shall be required of any candidate except in the case of candidates for Judges and Solicitors of the various Superior Court circuits. The Republican Executive Committee of any county having a population of more than 70,000 may assess an additional fee up to, but not to exceed, $2,500.00 against candidates for Judges and Solicitors General of the Superior Courts which must be paid before the name appears on the official ballot.

The fees paid to the Chairman or Secretary of the State Republican Executive Committee shall be remitted to the County Executive Committees conducting the primary for such office, in direct proportion to the number of polling places to be used, or to the candidates as is hereinafter provided. All fees collected from candidates and not used in the holding of a primary shall be remitted to the candidates on a pro rata basis.

The assessment paid by candidates for United States House of Representatives shall be divided by the District Committee among the various County Committees in the respective Congressional District, in accordance with the above distribution.

The Special Primary Committee hereinabove authorized shall be authorized to make assessments and prescribe qualifications for candidates for any office which might not be provided for by these rules.

14. In the case of any primary, if a candidate therein dies between the date of closing of the entries and the date of the primary, the entry shall reopen for a period of three days in the next succeeding ten-day period, not including the day of death.

15. No person shall circulate petitions seeking to have himself nominated for political office which petitions describe said person as a Republican or as the Republican nominee or in any way seek to identify himself with the Republican Party unless he shall first receive written approval from the Executive Committee which has the power to nominate him as the Party nominee under these rules.

16. The County Executive Committees and District Executive Committees shall set dates for meetings at which

the Republican Party Candidates to be nominated by them, and not by party primary, shall be nominated. Said meetings shall be held no later than August 31, 1964.

17. The State Committee at any meeting may nominate candidates provided for herein who are to be nominated by action of the Committee rather than by party primary.

Rules And Regulations

OF THE

State Democratic Executive Committee of Georgia

GOVERNING
DEMOCRATIC PRIMARY
ELECTIONS

ADOPTED MARCH 31, 1964

Prepared by:

THE
DEMOCRATIC PARTY
OF GEORGIA

***

State Headquarters
2504 Bank of Georgia Building
Atlanta, Georgia

TRAVIS B. STEWART
Executive Director

OFFICERS

State Democratic Executive Committee

J. B. Fuqua, *Chairman*
P. O. Box 1404
Augusta, Ga.

Mrs. Mamie K. Taylor, *Vice Chairman*
P. O. Box #4545
Atlanta 2, Georgia

Charles A. Pannell, *Vice Chairman*
Attorney at Law
Chatsworth, Georgia

Walter Dyal, *Vice Chairman*
McRae, Georgia

Braswell Deen, Jr., *Vice Chairman*
P. O. Box 267
Alma, Georgia

Wyck A. Knox, Sr., *Vice Chairman*
Thomson, Georgia

Quimby Melton, *Vice Chairman*
Griffin Daily Times
Griffin, Georgia

R. J. Marshburn, *Vice Chairman*
Homer, Georgia

Harold Ward, *Vice Chairman*

Judge, Superior Court
Dublin, Georgia

Lon Duckworth, *Vice Chairman*

P. O. Box 6207
Station H.
Atlanta 8, Georgia

Irving K. Kaler, *Vice Chairman*

Attorney at Law
Fulton National Bank Building
Atlanta, Georgia

George D. Stewart,
Permanent Secretary

Secretary, State Demo. Exec. Comm.
Hurt Building
Atlanta, Georgia

Mrs. Marjorie C. Thurman,
National Committeewoman

Bank of Georgia Building
Atlanta 3, Georgia

William P. Trotter,
National Committeeman

C & S National Bank Bldg.,
Atlanta 3, Georgia

W. D. Padgett, *Permanent Treasurer*

Trust Company of Georgia
Atlanta 3, Georgia

George M. Bazemore,
Permanent Treasurer

President, First National Bank
Waycross, Georgia

Eric Holmes, *Permanent Asst. Secretary*

161 Peachtree St., N. E.,
Atlanta 3, Georgia

Miss Louise Leavell,
Permanent Recording Secretary

701 Hurt Building
Atlanta 3, Georgia

J. Henry Castleman, *Sergeant-at-Arms*

3512 Main Street
College Park, Georgia

Travis B. Stewart, *Executive Director*

2504 Bank of Georgia Building
Atlanta 3, Georgia

State Democratic Executive Committeemen from the Congressional Districts

First District

James Darby
Vidalia, Ga.

V. H. Hooks
Metter, Ga.

Ernest W. Strickland
Daisy, Ga.

Tom L. Howard, Jr.
Ludowici, Ga.

Gordon Mays, Jr.
Millen, Ga.

Jack Sognier
Savannah, Ga.

Milton Carlton
Swainsboro, Ga.

Second District

Logan Lewis
Thomasville, Ga.

Sam J. Gardner, Jr.
Moultrie, Ga.

Dr. W. F. Zimmerman
Tifton, Ga.

Paul A. Keenan
Albany, Ga.

George T. Smith
Cairo, Ga.

Harvey Jordan
Leary, Ga.

Guy Maddox
Blakely, Ga.

George D. Busbee
Albany, Ga.

Third District

Kenneth Henson
Columbus, Ga.

Walter Rylander
Americus, Ga.

Nelson Coffin
Cuthbert, Ga.

Walter Childress
Dawson, Ga.

Henry McKemie
Fort Gaines, Ga.

Marion A. Allen
Fort Valley, Ga.

Dr. Earl A. Mayo
Richland, Ga.

Ethridge Paulk
Fitzgerald, Ga.

Fourth District

Arthur K. Bolton
Griffin, Ga.

Terrell Starr
Forest Park, Ga.

Virgil Bledsoe
Franklin, Ga.

Robert B. Gilbert
Greenville, Ga.

Hugo Starling
Thomaston, Ga.

Crawford Ware
Hogansville, Ga.

L. Lamar Aikens
Barnesville, Ga.

Hayne Waldrop
Villa Rica, Ga.

Fifth District

Guy W. Rutland, Jr.
Decatur, Ga.

Robert R. Richardson
Atlanta, Ga.

Wilson Brooks
Atlanta, Ga.

James B. Filcher
Atlanta, Ga.

Ivan Allen, Jr.
Atlanta, Ga.

Jack Adair
Atlanta, Ga.

J. William Gibson
Atlanta, Ga.

Marvin Shoob
Atlanta, Ga.

Sixth District

E. E. Griffin, Jr.
Gibson, Ga.

G. Lee Dickens, Jr.
Milledgeville, Ga.

Tom Carr
Sandersville, Ga.

Ben H. Hall
Dublin, Ga.

Tom Greene, Jr.
Macon, Ga.

John B. Stanley
Louisville, Ga.

Walter D. Burke
Warner Robins, Ga.

Seventh District

W. D. Trippe
Cedartown, Ga.

Fred D. Bentley
Marietta, Ga.

Mrs. M. Neil Andrews
LaFayette, Ga.

Glenn T. York
Cedartown, Ga.

J. B. Stewart, Sheriff
Ringgold, Ga.

Frank M. Hobgood
Calhoun, Ga.

Owen Westbrook
Bremen, Ga.

Eighth District

John W. Langdale
Valdosta, Ga.

Joe Isenberg
Brunswick, Ga.

Joseph A. Whittle
Brunswick, Ga.

Stetson Bennett, Jr.
Jesup, Ga.

Bill Monroe
Waycross, Ga.

Mrs. Eugene Talmadge
McRae, Ga.

Hugh Gillis
Soperton, Ga.

Ninth District

James A. Andrews
Toccoa, Ga.

Loyd Strickland
Chestnut Mountain, Ga.

Carl Barrett
Holly Springs, Ga.

Zell Miller
Young Harris, Ga.

Mrs. Amile Graves
Clarkesville, Ga.

P. T. McCutchen, Sr.
Ellijay, Ga.

R. E. Cannon
Clayton, Ga.

Harold Harrison
Bethlehem, Ga.

Tenth District

Hugh Logan
Athens, Ga.

Hamp McWhorter, Jr.
Lexington, Ga.

Julius F. Bishop
Athens, Ga.

Harrison Barnett
Washington, Ga.

Brooks Pennington, Jr.
Madison, Ga.

E. Lloyd Lewis
Greensboro, Ga.

Robert C. Norman
Augusta, Ga.

John W. McDonald
Augusta, Ga.

STATE AT LARGE COMMITTEEM

William H. Flowers
Thomasville, Ga.

Mrs. Tilitha Russell
McDonough, Ga.

Sam Hewlett, Jr.
Atlanta, Ga.

James L. Conner
Hazlehurst, Ga.

Verne H. Picken
Folkston, Ga.

Thomas T. Irwin
Mt. Airy, Ga.

Mrs. Iree Pope
Augusta, Ga.

Jake Pollard
Appling, Ga.

Sam C. Maguire, Jr.
Augusta, Ga.

Charles C. King
Covington, Ga.

N. Pratt Secrest
Thomasville, Ga.

Ogden Doremus
Savannah, Ga.

Wyck A. Knox, Sr.
Thomson, Ga.

A. T. Walden
Atlanta, Ga.

LeRoy Johnson
Atlanta, Ga.

J. Deming Whiting
Albany, Ga.

Mrs. Henry B. Williams
Atlanta, Ga.

C. O. Emmerich
Decatur, Ga.

Earl Edwards
West Point, Ga.

W. Dan Flexer, II
Brunswick, Ga.

James A. Dunlap
Gainesville, Ga.

Bob Ballew
Blue Ridge, Ga.

James S. Rivers
Cordele, Ga.

J. R. Allen
Columbus, Ga.

Jack Etheridge
Atlanta, Ga.

Charles M. Furchgott
Savannah, Ga.

Charles L. Gowen
Atlanta, Ga.

Byron H. Matthews, Jr.
Newnan, Ga.

John Sibley
Atlanta, Ga.

Mills B. Lane
Atlanta, Ga.

Ovid Davis
Atlanta, Ga.

Herbert W. Greene
Atlanta, Ga.

Pope McIntire
Atlanta, Ga.

William R. Bowdoin
Atlanta, Ga.

Dr. Bruce Schaefer
Toccoa, Ga.

Dr. John B. O'Neal
Elberton, Ga.

Robert Wright
Moultrie, Ga.

Sherman Drawdy
Augusta, Ga.

Richard M. Stewart
Valdosta, Ga.

Joe T. Lane
Forest Park, Ga.

Kenneth Kilpatrick
Forest Park, Ga.

Lawton Brannen
Metter, Ga.

Ernest Vandiver
Lavonia, Ga.

Peter Zack Geer
Colquitt, Ga.

James L. Bentley, Jr.
Thomaston, Ga.

Anton P. Solms
Savannah, Ga.

Harry Jackson
Columbus, Ga.

Joseph E. Birnie
Atlanta, Ga.

Phil Campbell
Atlanta, Ga.

Walter McDonald
Atlanta, Ga.

Jack B. Ray
Norwood, Ga.

John R. McCannon
Jonesboro, Ga.

Jimmy Williamson
Darien, Ga.

Carlos O. Henderson
Alpharetta, Ga.

Ben T. Huiet
Atlanta, Ga.

John Latimer
Marietta, Ga.

Emmett Weeks
McCaysville, Ga.

Wiley H. Montague, Sr.
Atlanta, Ga.

Alex Dunaway
Lincolnton, Ga.

Robert L. Vining, Jr.
Dalton, Ga.

Jess H. Watson
Cumming, Ga.

D. D. Barnard, Jr.
Augusta, Ga.

Henry G. Neal
Thomson, Ga.

Reed Harris
St. Simons Island, Ga.

George Talmadge Bagby
Dallas, Ga.

Duncan McRae, Jr.
Mt. Vernon, Ga.

Brack Blalock
Newnan, Ga.

Julian Webb
Donalsonville, Ga.

BE IT RESOLVED by the Executive Committee of the Democratic Party of Georgia duly assembled in regular session on March 31, 1964 in the City of Atlanta as follows, to-wit:

1.

That a Democratic Party Primary election be held on September 9, 1964 in each of the counties of this State for the nomination of candidates of the Democratic Party of Georgia for the following offices, whether for full or unexpired terms, or both, to-wit:

Justices of Supreme Court, Judges of the Court of Appeals, Public Service Commissioners, Representatives in The Congress of the United States from the various Congressional Districts of the State, Judges of the Superior Courts and Solicitors General required by law to be elected in the general election this year, Senators from the various Senatorial Districts, Representatives in the General Assembly from the various counties (except as Rule 26 herein may be applicable), and such other offices as are to be filled in the general election this year, 1964, for which candidates should be nominated in the Statewide Democratic Primary. The Chairman and

Secretary of this Committee are directed to include such offices as may be omitted or which, owing to later developments, should be included.

The entries for the State Democratic Primary election shall close May 2, 1964 at 12:00 o'clock noon, Eastern Standard Time.

2.

The Democratic primary election shall be conducted in accordance with the laws of this State and the customs of the Party, in so far as they do not conflict with existing laws and these rules.

All duly registered electors are qualified to vote in said primary if they possess the legal qualifications prescribed in Paragraphs II, III, and IV of Section I, Article II, of the present Constitution of Georgia, and in addition thereto are qualified in accordance with the rules and regulations of the Democratic Party of Georgia governing the said primary as herein contained, or as may be promulgated by proper authority of the Party prior to the holding of the said primary.

In addition to being a qualified and registered voter according to law and

in accordance with the rules and regulations of the Party, a voter must pledge himself or herself to support in the general election to be held in November 1964, all candidates nominated by the Democratic Party of Georgia in this primary, or in any run off or special primary held in Georgia by said Party, for the nomination of county, district, or state offices, preceding the general election aforesaid, and does by voting in said primary so pledge himself or herself.

The County Executive Committee of the Party holding the primary in each County and/or the Managers in charge of the primary election are hereby empowered to decide whether or not a person offering to vote, is qualified under the provisions of this rule.

3.

It shall be the duty of the Democratic Executive Committee of each county to select and properly advertise the legal place or places of voting in each election precinct of the county; to select, or provide for selecting capable managers and clerks for conducting the primary and administer the oaths to them; to furnish said managers a list of all registered

and qualified voters in the respective districts; to see to printing and proper distribution of all necessary blanks and ballots; and to make all other necessary arrangements for holding such primary election in their respective counties. In selecting managers and clerks, they shall, so far as practicable give recognition to all candidates. The polls shall open at 7:00 o'clock A.M., Eastern Standard Time, and close at 7:00 o'clock P.M., Eastern Standard Time, except where otherwise provided by local laws.

4.

The Secretary of this committee shall prepare an official ballot containing the names of all qualified candidates for nomination to the various offices filled by statewide vote and forward the same to the Chairman of each County Committee; and such Chairman of each County Committee shall follow the form of said official ballot in having ballots for his county printed, taking care to see that the names of all legally qualified candidates for nomination of officers to be voted on in said county at said primary election are printed thereon as worded in the official ballot.

In those counties where voting ma-

chines are used when authorized by law, the form of said official ballot shall be followed in naming the incumbent official to be succeeded and in describing the office to be filled.

5.

No person shall be deemed a candidate in said primary unless he is legally qualified to hold the office for which he announces, is a valid member and adherent of the Democratic Party of Georgia, gives the notice hereinafter required, pays the assessments hereinafter prescribed, by the time hereinbefore named, and complies with all the requirements of these rules. The voter shall obliterate from the ballot by marking through the names of those persons for whom he does not desire to vote, leaving on said ballot only the names of those persons for whom he desires to vote, unless voting machines are used in the county, in which case the County Democratic Executive Committee shall prescribe rules governing marking the ballot. If more than one candidate is to be nominated for a particular office each voter shall vote for as many persons as there are nominations to be made, otherwise his vote for candidates for that particular office shall not be counted. No ballot

shall be counted which does not conform to the official ballot.

6.

In order for any candidate to be declared a nominee of the Democratic Party of Georgia for Justice of Supreme Court, Judge of the Court of Appeals, Public Service Commissioner, Representatives in The Congress of the United States, State Senator, Judge of Superior Court and Solicitor General, or any other state house office, or any candidate offering for nomination for any local county office, such as sheriff, clerk of superior court, ordinary, including all local county officers, the candidate must have received a majority of the total of all popular votes cast for the nomination sought. Any candidate receiving a majority of the popular votes cast for the office sought shall be declared to be the nominee of the Democratic Party for such office.

If there are more than two candidates for any of the aforesaid offices and no candidate for any such office receives a majority of the popular votes cast, there shall be a second primary for such office, and the two candidates receiving

the highest number of popular votes in the first primary shall be the candidates in the second primary. The candidate receiving a majority of the popular votes cast in the second primary shall be declared the nominee for such office.

In the event it becomes necessary to hold a second primary for a nominee for any of the aforesaid offices, except local county officers where the local committee has previously set rules for the holding of an earlier primary, it shall be held on September 16, 1964, in accordance with the Rules and Regulations of the State Democratic Executive Committee.

7.

All candidates seeking nomination for Judge of the Superior Courts and Solicitor General in the various judicial circuits in Georgia shall be members in good standing of the State Bar of Georgia and shall be voted for only in the counties of their respective circuits. The candidates receiving a majority of the popular votes cast in their respective circuits shall be declared the Democratic nominees. Where two or more are to be nominated for concurrent terms in the same circuit, each candidate in such

primary shall be required to designate the place sought by naming the incumbent, and it shall so appear on the ballot.

All candidates for the State Senate shall be voted for only in the counties of their respective districts and the candidates receiving a majority of the popular votes cast in their respective district shall be declared the Democratic nominee.

8.

Insofar as the primary relates to the nomination of candidates for Congress from various Congressional Districts, such candidates shall be voted for only in the counties comprising their respective districts. Each Congressional Democratic Committee may adopt rules and regulations, not in conflict with these rules and regulations as it may deem proper, and may provide for holding a Democratic Convention in such District at such time and place, and under such rules and regulations as such Congressional Committee may adopt.

9.

The County Democratic Executive Committee of each County shall on the 10th day of September, 1964, at 10:00

o'clock, A.M., Eastern Standard Time, meet at the courthouse in said County, canvass and declare the result as shown by the returns made by the various election managers; the Chairman of each County Committee shall certify the results and transmit same to the Secretary of the State Democratic Executive Committee at once as time is of the essence.

The Chairman and Secretary of the State Democratic Executive Committee shall consolidate and publish the results of said election as shown by the returns certified by the various County Chairmen and shall certify the names of all Party nominees to the proper officials as provided by law.

10.

In the event of a second Primary, the result of the Primary shall be consolidated and published by the Chairman and Secretary of the State Democratic Executive Committee after the County Chairmen have consolidated the returns in each County at ten o'clock A.M., Eastern Standard Time, September 17, 1964, and forward the results to the Secretary of the State Democratic Executive Committee immediately there-

after. The Chairman and Secretary of this Committee shall certify the name of the Party nóminee of such second Primary to the proper officials not later than two days after such second Primary.

The candidate for offices to be filled by statewide vote who receive the majority of votes cast shall be declared the nominees of the Democratic Party for such offices.

11.

If there shall be a recount of the ballots in any county pursuant to the Act of the General Assembly of Georgia approved March 27, 1941, as amended by an Act approved Feb. 15, 1952, and as amended by an Act approved March 6, 1962, known as the Primary Election Recount Act, the certification of the result of any primary election in such county made pursuant to these rules, shall be superseded by the result of the recount of the ballots as made by the Committee, provided for by said Act of March 27, 1941, as amended, upon the report thereof being filed with the Executive Committee of the County, if the recount relates to a county office, and upon such report being filed with the

Chairman of this Committee if the recount relates to an office other than a county office.

The consolidation of the result of the primary which the Secretary of this Committee is required to make shall show the result of the primary as certified under the provisions of these rules, as the same may be corrected by reason of any recount of ballots made pursuant to said Act as amended.

12.

All contests of any primary election which shall require a recount of the ballots shall be conducted under and in conformity with said Act approved March 27, 1941, as amended. Should any candidate desire to contest the result of any primary election in any county upon grounds not contemplated or provided for by said Act approved March 27, 1941, as amended, he shall, within five days from the date of said primary, file with the Secretary of the County Executive Committee a written notice of said contest, which shall set forth in detail the grounds thereof. In the absence of the Secretary, such notice may be filed with any member of the County Executive Committee.

It shall be the duty of the Chairman of the County Executive Committee to call a meeting of the County Executive Committee after giving two days' notice thereof to the parties in such contest relative to matters not contemplated and the County Executive Committee shall, at such meeting, proceed to hear and determine the contest. The Chairman of the County Committee shall certify to the Secretary of the State Executive Committee the returns and results in such county as soon as the contest is heard and determined, which shall in no event be later than ten days after the filing of the notice of the contest. Either party to such contest who is dissatisfied with the determination of the County Executive Committee may appeal in writing to the State Executive Committee. Such appeal must be filed with the Secretary of the State Executive Committee within five days after the contest is determined by the County Committee and must show by affidavit that a copy thereof was served upon the opposite party to the contest before its filing with the Secretary of the State Committee. Said contest shall be heard and decided by the Contest Committee named by the State Chairman. The appeal shall be heard upon the evidence

submitted to the County Executive Committee and no new evidence shall be submitted to the Committee except newly discovered evidence.

The appellant shall file a copy of his appeal with the secretary or chairman of the County Committee hearing the contest and it shall be the duty of the Chairman and Secretary of the County Committee, within three days from the filing of the copy of the appeal with the secretary of the County Committee, to transmit to the Secretary of the State Executive Committee the findings of the County Committee and a complete transcript of the evidence upon which such findings were made and all records of the contest. This record shall be verified by the affidavit of the Chairman and the Secretary of the County Committee. When the contest is determined the result of its determination shall be certified to the Chairman of the County Executive Committee, where the contest originated, by the Secretary of the State Executive Committee. The finding of the Contest Committee on such contest shall in all cases be final and conclusive of all the rights of the parties to the contest, and the County Executive Committee in making its certificate of Dem-

ocratic nominees to the proper county or state authority for the general election, shall be bound thereby and certify in conformity therewith.

13.

No candidate in said primary election shall be declared the nominee of the party for any office if it is proved that in the conduct of hi campaign for the nomination he violated any election law of Georgia, or in case of candidates for the National Congress, any election law of Georgia or of the United States.

14.

The State Democratic Executive Committee is hereby called to meet at eleven o'clock a.m., Eastern Standard Time in the City of Atlanta on the 20th day of September, 1964, to canvass the result of said primary election in accordance with these rules and nominate candidates in conformity with such results and direct the certification of the nominees to the proper officials and to attend to such other business of the party as may be properly brought before the committee. The Chairman of the Committee shall select a suitable place for holding such meeting.

15.

In the event of a second primary election, the special subcommittee, acting in conjunction with the Chairman and Secretary of this Committee, referred to hereafter shall have full power and authority to levy reasonable assessments upon the candidates participating in said second primary, and to make such other rules and regulations regarding it, not in conflict with the laws of Georgia and the rules of this Committee, as may be necessary.

16.

The candidates for United States House of Representatives who are nominated in this primary shall appoint a Congressional Committee to serve for the next two years, which Committee shall meet immediately upon its appointment and organize by electing such officers as it determines necessary. Vacancies in any Congressional Democratic Executive Committee shall be filled by appointment of the Congressional incumbent provided he is a Democrat, otherwise vacancies shall be filled by the Committee.

The State Senatorial candidate in each Senatorial District in this State

who is nominated at this primary may name a Senatorial Committee to serve for two years, who shall meet and organize by electing such officers as it deems necessary. Vacancies occurring on said Committee shall be filled by appointment of the Senatorial incumbent provided he is a Democrat, otherwise vacancies shall be filled by the Committee.

17.

There is hereby created a subcommittee to be known as the Special Primary Subcommittee which shall be composed of the Chairman, Secretary of the State Democratic Executive Committee, the Executive Director and five members of the State Democratic Executive Committee, named by the Chairman, which said Subcommittee shall handle details of the primary subject to these rules. The said subcommittee is authorized to conduct appeal hearings for the State Committee and empowered further to amend these rules and make such other rules and regulations relating to all county and statewide primaries held in 1964 not inconsistent with applicable laws as in its discretion it may deem advisable.

18.

No manager, clerk or other officer engaged or officiating in any primary shall give out, make known, or furnish, during the progress of such primary, any information concerning the number of votes cast for any candidate.

19.

The ballots at said primary shall be publicly counted and the count shall not begin until the polls are officially closed.

20.

These rules shall remain in full force and effect and apply where applicable to all Party matters until repealed or modified.

21.

Any person dissatisfied with any decision of the local, county or district committee shall have the right of appeal to the State Executive Committee and the State Executive Committee or the Special Primary Subcommittee shall have the right to determine said issue in accordance with the law and these rules and customs of the Party.

22.

The chairman and secretary of each county committee shall certify the results of the election for nomination to the United States House of Representatives and transmit the same to the Secretary of the proper district committee at once, except in case of contest, and in case of contest, as soon as the contest before the county committee has been determined; and it shall be the duty of said secretary to present said returns, with proper consolidation thereof, to the district convention herein provided for.

23.

All of the rules for contest as provided in these rules shall be binding upon the county committees and shall be applicable to Congressional candidates, except that certification shall be made from the county committees to the chairman and secretary of the Congressional Committee as herein provided, which shall be laid before the district convention and such convention shall determine the result of the election in such race in the same manner as contests are determined under these rules by the state convention, when in session.

Entrance fees for candidates for the various offices are assessed as follows:

Justices of the Supreme Court	$1,000.00
Judges of Court of Appeals	$1,000.00
Public Service Commissioner	$1,000.00
United States House of Representatives	$ 750.00
Judges of the Superior Courts	$ 750.00
Solicitors General of the Superior Courts	$ 500.00
State Senators	$ 500.00

Candidates for the State House of Representatives are to be assessed by the Democratic Executive Committee of the Counties in which they are candidates.

Candidates for the United States House of Representatives and all State House offices, including Justices of the Supreme Court, Judges of the Court of Appeals, Public Service Commissioners, State Senators, Judges and Solicitors General of the Superior Courts shall

pay said fees to the Chairman or Secretary of the State Democratic Executive Committee who shall maintain an office in the State Capitol Building, on or before the closing date herein provided for, accompanied by a statement signed by the candidates naming the office for which he entered and pledging himself to abide by the results of the primary. If the office is one for which two or more persons are to be nominated he shall describe the place he seeks by naming the incumbent.

Candidates for the State House of Representatives will pay their assessments to and qualify with the Chairman or Secretary of the County Democratic Executive Committee in the County where they propose to run.

No other assessments or qualifications shall be required of any candidate except in the case of candidates for Judges and Solicitors of the various Superior Court circuits. The Democratic Executive Committee of any county having a population of more than 70,000 may assess an additional fee up to but not to exceed $2,500.00 against candidates for Judges and Solicitors General of the Superior Courts which must be

paid before the name appears on the official ballot.

The fees paid to the Chairman or Secretary of the State Democratic Executive Committee by candidates for Judge and Solicitors of the various Superior Court circuits shall be remitted to the Democratic Executive Committee of the respective counties of each circuit in the proportion that the former county unit votes of any particular county bear to the former county unit votes of the counties constituting the circuit, based on fees charged in 1962 Rules and Regulations.

The assessment paid by candidates for United States House of Representatives shall be divided by the Secretary and Chairman of the State Democratic Executive Committee among the various County Committees in the respective Congressional Districts, as provided in the foregoing paragraph.

The Chairman and Secretary of the State Democratic Executive Committee are authorized to make assessments and prescribe qualifications for candidates for any office which might not be provided for by these rules.

The various County Committees or

Congressional Committees may fix closing dates for State House of Representatives and United States House of Representatives earlier but not later than the one fixed by these rules provided an announcement shall be made of such change in the local newspapers at least ten days prior to the closing date thus fixed. Those previously so fixed are hereby ratified and confirmed.

In the event no candidate is nominated for any office as a result of the Primary election or any nominee dies before the general election, or any vacancy occurs in any nomination for any reason, this Committee shall nominate a candidate, and fill such a vacancy. In the event a candidate dies between the date of the closing of the entries and the date of the Primary the entries shall reopen for a period of two days, not including the day of the death.

All funds now or hereafter in the hands of the Treasurer of this Committee shall be paid out by him for any expenses in connection with this Committee and for the advancement of the Party and only upon the written approval of the Treasurer and Chairman of said Committee, said Treasurer and Chairman being authorized and re-

quested to raise necessary funds and to expend same in their discretion for the promotion and advancement of the Democratic Party.

25.

In addition to rules already in force, it is hereby provided that County Committees shall choose their Chairman and Secretary, and all their officers, from members of the Committee. The Committee can be convened at any time by two days' notice by an officer, or by a majority of its members, or as may be provided by rule of the County Committee.

26.

Any person nominated as a Democratic Candidate for membership in the House of Representatives of Georgia at a county primary, as authorized by an Act of the General Assembly of Georgia approved February 20, 1956 (Ga. Laws 1956, p. 159) and as amended by an Act of the General Assembly of Georgia approved February 15, 1960 (Ga. Laws 1960, p. 115) and an Act approved September 1962, Extra Session, which permit, subject to the limitations expressed in said Acts, the nomination of candi-

dates for the House of Representatives at county primaries in counties having a population of 115,000 or less, shall be the nominee of the Democratic Party for such office without becoming a candidate at the State primary to be held September 9, 1964, and shall be so certified by the proper officials of the Democratic Party.

27.

Each County Democratic Executive Committee shall make such rules as it sees fit not inconsistent with these rules, and with the laws of Georgia. All vacancies in the County Committee shall be filled by election by the remaining members of the Committee.

In the event any county failed to elect a County Committee as provided by party rules, the Chairman of the State Executive Committee is authorized to name a Committee for such County to serve for the remainder of the unexpired term of four years.

[fol. 252] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 7883

HENRY J. TOOMBS, et al., Plaintiffs,

vs.

BEN W. FORTSON, JR., as Secretary of State of Georgia, et al., Defendants.

REVISED ORDER—June 30, 1964

All parties having consented thereto, the order of the Court dated June 24, 1964, is hereby revised to read as follows:

It is now Ordered, Adjudged and Decreed as follows:

(1) Article III, Section III, Paragraph I (Code Section 2-1501) of the Constitution of Georgia of 1945, is hereby declared to be null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States.

Section 47-101 of the Code of Georgia, as amended, is hereby declared to be prospectively null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States, for elections to the House of Representatives after the General Election to be held in November of 1964.

(2) The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held [fol. 253] on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely

new constitution therefor shall be adopted; provided, however, nothing in this order shall prevent the submission of amendments to the Constitution of the State of Georgia which are separate as to subject matter, in accordance with Article XIII, Section I, Article 1, of the Constitution of the State of Georgia, 1945. (See *Hammond* v. *Clarke*, 136 Ga. 313, for a discussion by the Georgia Supreme Court of what constitutes separate amendments). Nor shall anything in this order prevent the calling by the General Assembly of a "convention of the people to revise, amend or change the constitution" if the representation "in the convention is based on population as near as practicable" with the members being elected by the people (see Article XIII, Section I, Article 2). Constitution of the State of Georgia, 1945.

(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that notwithstanding anything in Article III, Section IV, Paragraph I (Code Section 2-1601) of the Constitution of Georgia of 1945 to the contrary, the service of the members of the House of Representatives of the General Assembly of the State of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session, [fol. 254] as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements and as may be necessary to permit the holding of elections to the newly constituted General Assembly, said elections to be held at such times as may be necessary to permit the Members of such General Assembly to take office as soon as practicable, but in no event later than the second Monday in January, 1966.

The Court will retain jurisdiction of this cause for such other and further orders as may be necessary.

This 30th day of June, 1964.

Elbert P. Tuttle, United States Circuit Judge.

Griffin B. Bell, United States Circuit Judge.

Lewis R. Morgan, United States District Judge.

[fol. 255] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 7883

HENRY J. TOOMBS, et al., Plaintiffs,

v.

BEN W. FORTSON, JR., as Secretary of State of Georgia, et al., Defendants.

AFFIDAVIT—Filed July 1, 1964

Personally appeared Israel Katz, who being first duly sworn, on oath, deposes and states as follows:

1.

I am one of the attorneys representing the plaintiffs in the above case and in such capacity investigated the status of the nomination of candidates for election to the Georgia House of Representatives at the November 3, 1964 General Election. The facts hereafter stated were collected from the Office of the Speaker of the House of Representatives, the Secretary of the Georgia State Democratic Executive Committee, and numerous articles appearing in The Atlanta Journal and The Atlanta Constitution.

2.

Fifty-two candidates for election to the Georgia House of Representatives had been nominated in early Democratic primary elections; information as to what number of such early primary elections were contested is not available, although it is known that at least five of such early primaries were uncontested.

[fol. 256]

3.

Three candidates for election to the Georgia House of Representatives will be nominated in Democratic primary elections conducted between July 1 and the regular September Democratic primary election, all of which are contested.

4.

Seventy-nine candidates for election to the Georgia House of Representatives are unopposed in the regular September Democratic primary election.

5.

Seventy-four candidates for election to the Georgia House of Representatives will be nominated in contested races at the regular September Democratic primary election.

Israel Katz

Sworn to and subscribed before me, this 24th day of June, 1964.

Teresa Brown, Notary Public, Georgia, State at Large, My Commission Expires June 13, 1966.

Certificate of Service (omitted in printing).

[fol. 257] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 7883

HENRY J. TOOMBS, et al., Plaintiffs,

v.

BEN W. FORTSON, JR., as Secretary of State of Georgia, et al., Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 1, 1964

I

Parties Taking Appeal and Judgment Appealed From

Notice is hereby given that Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, James F. White, Ordinary of Fayette County, Georgia, A. B. Tollison, Ordinary of Forsyth County, Georgia, Robert F. Abercrombie, Ordinary of Douglas County, Georgia, and Jim W. Dickerson, Ordinary Cherokee County, Georgia, defendants in the above stated matter, hereby appeal to the Supreme Court of the United States from the order dated June 24, 1964, as revised, June 30, 1964, rendered by the special three-judge district court convened pursuant to 28 USC, §2281, which order granted permanent injunction and declaratory judgment with respect to the apportionment of the House of Representatives of the General Assembly of Georgia, and granted other relief with respect thereto as therein set forth.

This appeal is taken pursuant to 28 USC, §1253, authorizing direct appeals from interlocutory or permanent injunctions issued after hearing by special three-judge fed- [fol. 258] eral courts convened pursuant to 28 USCA 2281 et seq.

II

Designation of Record

The Clerk will please prepare a transcript of the record in this case, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The complaint and all amendments thereto.
2. The motion to dismiss and answer filed by defendants, May 1, 1962.
3. Answer of Katherine E. Mann.
4. Answer of Eugene Gunby.
5. Amendment of defendants to answer, filed October 13, 1962.
6. The motion of plaintiffs for further relief, filed June 17, 1964.
7. The several orders and opinions of the Court dated May 25, 1962, July 13, 1962, September 5, 1962, October 19, 1962, and the show cause order dated June 19, 1964.
8. Motion of City of Atlanta to appear as amicus curiae.
9. Motion of Frank S. Twitty, et al., to appear, and order thereon.
10. Response of Defendants to Show Cause Order, filed June 24, 1964.
11. Plaintiffs' Supplement to Complaint, filed June 24, 1964.
12. The order and decree rendered June 24, 1964.
13. Motion of plaintiffs to amend decree.
14. Revised decree, dated June 30, 1964.
15. Stipulation of counsel.
16. Affidavit of Israel Katz.

[fol. 259]

III

Questions Presented

1. Whether under a complaint by urban plaintiffs attacking the apportionment of members in the House of Representatives of the General Assembly of Georgia, the district court, having found the apportionment in said House to be unconstitutional under the Fourteenth Amendment to the Constitution of the United States, acted within its power and authority in not only requiring reapportionment of said House, but also in enjoining the placing on the General Election ballot in the 1964 November General Election for ratification or rejection by the people of a proposed new constitution which had been submitted by a two-thirds vote of both Houses of the General Assembly during a 1964 special session called for that purpose, the Senate having previously been reapportioned on a population basis in 1962?

2. Whether in such a case the district court acted within its power and authority in also issuing injunctive order purporting to limit the jurisdiction of the General Assembly which convenes in January, 1965, to the consideration and enactment of "such legislation as shall properly come before the said Legislature during the regular 1965 45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements, and as may be necessary to permit the holding of elections to the newly constituted General Assembly . . ."

3. Whether the district court, erred in interpreting Article XIII, Section I of the Constitution of Georgia of [fol. 260] 1945 as limiting the power of the people in adopting an entirely new constitution exclusively to the convention method, with delegates thereto selected only by vote of the people, it appearing that the Supreme Court of Georgia previously had held that under substantially identical provisions of the Constitution of Georgia of 1877, the convention method was not exclusive, and that the same

revision procedure enjoined by the district court below was valid.

4. Whether the district court erred in refusing to abstain from making an independent interpretation of Article XIII, Section I of the Constitution of Georgia of 1945, defining the methods of constitutional revision and amendment, the district court itself having indicated doubt as to the proper determination of these state-law questions.

Eugene Cook, Attorney General, Judicial Building, 40 Capitol Square, Atlanta, Georgia;

E. Freeman Leverett, Deputy Assistant Attorney General, 25 Thomas Street, Elberton, Georgia.

[fol. 261] Certificate of Service (omitted in printing).

[fol. 262] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LETTER—Filed July 10, 1964

THE DEPARTMENT OF LAW
STATE OF GEORGIA
ATLANTA

(Emblem)

EUGENE COOK
THE ATTORNEY GENERAL

July 9, 1964

Clerk, U. S. District Court
Northern District of Georgia
Old Post Office Building
Atlanta, Georgia

In re: Toombs vs. Fortson
#7883

Dear Sir:

In accordance with the telephone conversation between your office and one of my Assistants this date, this is to request that you add to the designation of record in our Notice of Appeal the following:

Transcript of the hearing of June 19th.

Yours very truly,

/s/ EUGENE COOK
Eugene Cook
Attorney General

EC/mg
cc:
Mr. Francis Shackelford
Mr. James M. Sibley
Mr. George Dillard

[fol. 263] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STIPULATION AS TO DESIGNATION OF RECORD ON APPEAL—Filed July 13, 1964

The undersigned, counsel for the respective parties, hereby stipulate pursuant to Rule 12 (3) of the Revised Rules of the Supreme Court of the United States that the record and proceedings designated in the foregoing notice of appeal shall be the portions of the record transmitted to the Clerk of the Supreme Court of the United States. It is further stipulated that either of the parties may refer to or reproduce in briefs any other portion of the record not designated or transmitted.

This 11th day of July, 1964.

Francis Shackelford, Attorney for Plaintiffs.

E. Freeman Leverett, Attorney for Defendants.

[fol. 264] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 265]

SUPREME COURT OF THE UNITED STATES

No. 300—October Term, 1964

BEN W. FORTSON, JR., as Secretary of State of Georgia, et al., Appellants,

vs.

HENRY J. TOOMBS, et al.

Appeal from the United States District Court for the Northern District of Georgia.

ORDER NOTING PROBABLE JURISDICTION—October 12, 1964

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 300

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia; A. B. TOLLISON, Ordinary of Forsyth County, Georgia; ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia; and JIM W. DICKERSON, Ordinary of Cherokee County, Georgia,
Appellants,
vs.
HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

MOTION TO ADVANCE
and
STATEMENT AS TO JURISDICTION.

EUGENE COOK,
Attorney General of Georgia,

132 Judicial Building,
40 Capitol Square,
Atlanta, Georgia,

E. FREEMAN LEVERETT,
Deputy Assistant Attorney General,

Elberton, Georgia,

Attorneys for Appellant, Ben W. Fortson, Jr., Secretary of State, et al.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. .....

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia; A. B. TOLLISON, Ordinary of Forsyth County, Georgia; ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia; and JIM W. DICKERSON, Ordinary of Cherokee County, Georgia,
Appellants,

vs.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

MOTION TO ADVANCE.

Come now Ben W. Fortson, Jr., Secretary of State of the State of Georgia et al., appellants in the above stated case, and show as follows:

1.

The above case is an appeal by Ben W. Fortson, Jr., Secretary of State of the State of Georgia, and four Ordinaries of said State from an order and decree rendered June 30, 1964, by a three-judge court of the Northern District of Georgia, convened pursuant to 28 U. S. C. A.

2281 et seq., which, in addition to requiring reapportionment of the House of Representatives of the General Assembly of Georgia (the Senate having been reapportioned in 1962), also (1) Enjoined submission of a proposed new Constitution to the voters for ratification or rejection in the November, 1965 General Election, and (2) Limited the authority of the House of Representatives which convenes in January, 1965 (a) To service only during the 45 day session, and (b) To the consideration of "legislation".

2.

Movants show that the proposed new constitution the submission of which was enjoined by the Court below was the principal product of a 1964 special session of the General Assembly of Georgia, conducted at a cost of over one million dollars, in which said constitution received the overwhelming approval of both houses of the General Assembly, including the population-based Senate. Movants further show that the effect of the injunction below is to deny the right of all Georgians to express their choice in a general election in which the vote of every person counts the same as that of every other person.

3.

With respect to so much of the decree as relates to the House of Representatives, the effect is to prohibit said House from voting impeachment charges, conducting investigations or election contests, electing or removing a state auditor, submitting constitutional amendments, appointing interim committees or permitting them to function, and to prohibit the expenditure of funds for maintaining the offices of its Speaker and other officials after the end of the Session.

4.

Movants say that for the foregoing reasons, said decree is the most drastic ever rendered by any court, and places the State of Georgia virtually in a receivership.

5.

Motion for stay was denied by the Court below, and by Mr. Justice Black of this Court on July 6, 1964.

6.

Due to the imminence of the November General Election, and the period of approximately forty-five days prior thereto required for advertising and preparation of the ballot, unless this Court acts sometime not later than the middle of September, so much of the decree below as enjoins submission of the proposed new Constitution will become moot, and unless decision is rendered prior to January, 1965, the House of Representatives will be convened under circumstances of extreme confusion and uncertainty.

Wherefore, appellants, movants herein, pray that this case be advanced on the calendar and heard at the earliest possible moment, and that if possible, a special session of this Court be convened to hear the same.

EUGENE COOK,
The Attorney General of Georgia.
132 Judicial Building,
40 Capitol Square,
Atlanta, Georgia,

E. FREEMAN LEVERETT,
Deputy Assistant Attorney General,
Elberton, Georgia,

Attorneys for Appellants.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. .....

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia; A. B. TOLLISON, Ordinary of Forsyth County, Georgia; ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia; and JIM W. DICKERSON, Ordinary of Cherokee County, Georgia,
Appellants,

vs.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

STATEMENT AS TO JURISDICTION.

In compliance with Rules 13 and 15 of this Court, Ben W. Fortson, Jr., Secretary of State of the State of Georgia, et al,, Appellants, submit herewith this statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review permanent injunction granted by a special three-judge court, convened pursuant to 28 U. S. C. A. 2281, et seq., enjoining appellants (defendants below) from placing on the 1964 November general election ballot for submission to

the voters for ratification or rejection, a proposed new Constitution, as approved and submitted by a two-thirds vote of both Houses of the General Assembly, and undertaking to limit the Authority of the General Assembly which convenes in 1965 to the consideration of specified "legislation," and to function during the 45 day session only.

OPINION BELOW.

The opinion rendered with respect to the decree herein appealed from, dated June 19, 1964, is not yet reported, but is attached hereto as "Appendix A." The decree rendered pursuant to the opinion just referred to, dated June 24, 1964, is attached hereto as "Appendix B." On June 30, the last-mentioned decree or order was revised, and is attached hereto as "Appendix C." The decision of the Court at an earlier stage of this litigation is reported as **Toombs v. Fortson**, 205 F. Supp. 248 (D. C. Ga. 1962).

BASIS OF JURISDICTION.

I.

This case began as an action by appellees, residents of the two most populous counties of Georgia, attacking the apportionment under the Fourteenth Amendment of both houses of the General Assembly of Georgia, Constitution of Georgia, Art. III, Secs. II and III; Ga. Code Ann., §§ 47-101, 47-102. In an earlier appearance of the case, the district court held that one house of the General Assembly was required to be apportioned according to population. **Toombs v. Fortson**, supra. This was accomplished in 1962, when the Senate was reapportioned by division of the State into 54 single member districts containing substantially equal numbers of people. See Ga. Laws 1962, 2nd Ex. Sess., p. 7, 51. Following rendition of this Court's opinion in **Reynolds v. Sims**, ... U. S. ..., 32 L. W. 4535 (1964), plaintiffs below filed motion for further relief,

seeking in effect to require reapportionment of the House of Representatives. After hearing, the Court finally entered order on June 24, later revised June 30, 1964, which (1) declared unconstitutional the state constitutional and statutory provisions governing apportionment of the House of Representatives, (2) Enjoined defendants from placing on the 1964 General election ballot, a proposed new constitution approved by a 1964 extraordinary session of the General Assembly, and (3) in addition to requiring that a reapportioned House take office not later than January, 1966, undertook to limit the authority of the 1965 General Assembly to specified "legislation," and to function during the 45 day session only.

II.

Notice of appeal was filed below on July 1, 1964.

III.

The jurisdiction of this Court to review on appeal the permanent injunction rendered below is conferred by 28 U. S. C. A. 1253.

IV.

Cases which sustain the jurisdiction of this Court to review on direct appeal the permanent injunction issued by the three-judge court below are **Reynolds v. Sims**, ... U. S. ..., 32 L. W. 4535 (1964); **Davis v. Mann**, ... U. S. ..., 32 L. W. 4579 (1964); and **Roman v. Sincock**, ... U. S. ..., 32 L. W. 4583 (1964).

V.

The Georgia Constitutional and statutory provisions declared unconstitutional below are as follows:

(a) Constitution of Georgia of 1945, Art. III, Sec. III, Par. I (Code § 2-1501).

(b) Georgia Code, § 47-101, as amended.

Copies of these provisions are attached hereto as "Appendix D."

Provisions of the Georgia Constitutions of 1877 and 1945 governing amendment and revision of the Constitution, also drawn in question in this case, are attached hereto as "Appendix E."

QUESTIONS PRESENTED.

1. Whether a federal district court in a reapportionment case involving one house of a state legislature, the other house already being on a population basis, has authority to grant relief not only requiring reapportionment of the house found to be defective, but also enjoining submission to the voters for ratification or rejection of a proposed constitution approved by a two-thirds vote of the State legislature?

2. Whether in such a case a federal court also is empowered to grant relief purporting to limit the matters which the legislature may consider pending reapportionment, and to further limit the House of Representatives from functioning except during the regular 45 day session?

3. Whether the district court erred in interpreting a state constitutional provision governing constitutional amendments contrary to the interpretation placed on a similar provision of a prior constitution by the highest court of the state?

4. Whether upon finding a provision of a state constitution governing constitutional amendments to be "doubtful," the federal district court erred in refusing to abstain from making an independent interpretation thereof pending a determination by state courts, but proceeded to make its independent interpretation, and based thereon, to enjoin submission to the voters of a proposed new constitution?

STATEMENT OF THE CASE.

This case, an early aftermath of this Court's decision in **Reynolds v. Sims**, supra, draws in issue only the question as to the appropriateness of relief in a reapportionment case involving a state legislature. The question of apportionment standards under the Fourteenth Amendment is not in question here, for appellants do not appeal from so much of the decree below as requires that the House of Representatives of the General Assembly of Georgia be reapportioned on a population basis.

On April 4, 1962, four citizens of Georgia, residents of the state's two most populous counties, filed complaint against Ben W. Fortson, Jr., Secretary of the State of Georgia, and the Ordinaries of six counties in Georgia,[1] attacking the validity under the Fourteenth Amendment of the constitutional and statutory provisions governing apportionment of the House of Representatives[2] and state Senate.[3]

A three-judge court was convened pursuant to 28 U. S. C. A., §§ 2281, 2284, and after hearing, rendered its decision on May 25, 1962, declaring that ". . . [W]e determine and hold that so long as the Legislature of the State of Georgia does not have at least one house elected by the people of the State apportioned to population,

---

[1] Under the Georgia law, the Secretary of State and county ordinaries are primarily responsible for the conduct of elections. See Ga. Code, Title 34.

[2] Constitution of Georgia, Art. III, Sec. III, Par. I (Code, § 2-1501); Ga. Code Ann., § 47-101.

[3] Constitution of Georgia, Art. III, Sec. II, Par. I (Code, § 2-1401); Ga. Code Ann., § 47-102. The complaint also attacked as being unconstitutional state statutes establishing a "rotation plan" whereby the nomination of candidates in the senate would be "rotated" among each of the counties in the senatorial district. See Ga. Laws 1946, p. 42, as amended; Ga. Laws 1950, p. 165; Ga. Laws 1939, p. 311.

it fails to meet constitutional requirements". With respect to relief, the Court declared, "We have concluded that we should postpone any further proceedings in this matter until the State has had a reasonable opportunity to meet the constitutional standards here laid down prior to the January, 1963, session." **Toombs v. Fortson**, 205 F. Supp. 248, 257, 259 (D. C. Ga. 1962).

Several clarifying opinions were later rendered by the Court, but none of them had the effect of changing the Court's original order.

Under the Constitution and laws of Georgia, members of the House and Senate were to be elected for two-year terms in the 1962 November General Election, and notwithstanding that the General Assembly had just completed one extraordinary session in April, an unprecedented second extraordinary session was called by the Governor which convened on September 27, 1962; to consider measures reapportioning one house in accordance with the Court's opinion.[4]

The General Assembly convened in extraordinary session as scheduled and enacted legislation and proposed a constitutional amendment, providing for reapportionment of the State Senate on the basis of 54 single member senatorial districts comprising substantially equal numbers of people (Ga. Laws 1962, 2nd Ex. Sess., pp. 7, 51). The constitutional amendment was ratified by the people in the 1962 November General Election, and also at said election, senators were elected in accordance with the new reapportionment legislation to take office in January, 1963. Litigation involving the validity of so much of this legislation as required county-wide voting for senators in multi-district counties is now before this court in an appeal entitled **Fortson v. Dorsey**, No. 1213, Oc-

[4] Ga. Laws 1962, 2nd Ex. Sess., p. 3.

tober Term 1963.[5] Other than as involved in the case last mentioned, the validity of the 1962 reapportionment legislation is not in question, the court below as well as plaintiffs herein having recognized that said legislation effectuated a valid reapportionment of the Georgia Senate on a population basis in accordance with federal constitutional stamlards. The State of Georgia thereby fulfilled its constitutional responsibility within the same year of the court's decision, without the necessity of a single injunctive order ever having been issued.

On June 17, 1964, two days after rendition of this Court's decision in **Reynolds v. Sims**, ... U. S. ..., 32 Law Week 4535, plaintiffs below filed motion for further relief, seeking to compel reapportionment of the House of Represenfatives of the General Assembly of Georgia.

Hearing on said motion was duly held on June 19, 1964, and on the same date the Court rendered an opinion and a proposed order. In its opinion, the Court declared that, "It is thus plain to all that the present Legislature is constituted in such a manner as to violate the Constitutional rights of the plaintiffs and the class which they represent."

With respect to relief, the Court noted that the General Assembly was at that time convened in special session considering the enactment of an election code, and the proposing of a new state constitution.[6]

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[5] For the decision below, see *Dorsey v. Fortson*, 228 F. Supp. 259 (D. C. Ga. 1964).

[6] This extraordinary session had been called by the Governor, primarily for the purpose of considering a new state constitution, without regard to any considerations of apportionment, but simply in response to widespread demand from all areas of the state, predicated upon the statutory detail of the 1945 Constitution which had made necessary over 380 amendments within less than 20 years. Consideration of the election code at this same session was merely an afterthought, suggested by the fact that while one house was considering the Constitution, the other house could be devoting its time to the election code.

With respect to the election code, the court observed that it could be changed by a subsequently reapportioned legislature merely by majority vote. With respect to the proposed constitution, however, the Court noted that it could be amended later only by a two-thirds vote of both houses, and ratification by the people. Also in this connection, the Court expressed doubt as to the validity of the pending constitutional revision procedure under the state constitution. In this respect, the Court had reference to a contention currently being made in the public press to the effect that because the Georgia Constitution made provision for specific, individual amendments by two-thirds vote of both houses and ratification by the people,[7] where as in another provision dealing with conventions of the people, reference is made to "revising the Constitution,"[8] the necessary inference is that the preparation of an **entirely new constitution** can be submitted only by a convention, which admittedly had not been the case as to the pending Constitution.[9]

On the basis of these considerations—federal law considerations as to malapportionment, and state law con-

[7] Constitution of Georgia, Art. XIII, Sec. I, Par. I.

[8] Id., Par. II.

[9] The proposed new Constitution was originally drafted by a "Constitution Revision Commission" created by law, the members of which were appointed by the Governor. See Ga. Laws 1963, p. 402. This draft was then submitted to the General Assembly where it received a vote of two-thirds of the members of both houses, including the population-based senate. The proposal would then be submitted to the people for ratification or rejection in the November 1964 general election. The identical procedure was employed in connection with the adoption of the 1945 Constitution under the 1877 Constitution which was for all purposes here identical to the 1945 Constitution as regards amendment procedures. See "Appendix E." In *Wheeler v. Trustees of Fargo School District*, 200 Ga. 323, 37 S. E. 2d 322 (1946), the Supreme Court of Georgia upheld the submission procedures utilized with respect to the 1945 Constitution and now being invoked with respect to the pending constitution, on the reasoning that the provision of the Constitution relating to conventions was not exclusive, but a limitation only if the convention procedure were followed.

siderations as to the legality of the proposed procedure—the court concluded:

> "Thus, while we feel it appropriate in the exercise of the judicial function to permit the General Assembly to reapportion itself, since the guidelines now established by the Supreme Court are plain and simple, we do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as is the case here, proposed under conditions of doubtful legality by a malapportioned legislative body" (See "Appendix A").

The Court then set forth a proposed order which, in addition to declaring unconstitutional the state constitutional and statutory provisions governing apportionment of the House of Representatives, also would (1) Enjoin submission of the proposed new state Constitution, and (2) Limit the authority of the 1965 General Assembly, pending reapportionment, (a) to specified "legislation", and (b) to functioning during the regular 45 day session.

Appellants filed response in opposition to this proposed order, but after hearing, the Court issued the order in substantially the same form as previously indicated, on June 24, 1964 (See "Appendix B"). The order was later revised on July 30 (Appendix C).

Application for stay was denied below, and by Mr. Justice Black of this Court on July 6, 1964.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

As previously stated, this case draws in question the appropriateness of relief in a reapportionment case beyond the mere compelling of reapportionment itself.

Essentially, the question is whether a federal court, having decreed reapportionment of one house of a state legislature, acts properly and within its authority in seeking to delimit the law-making process during the interim period pending reapportionment. Collaterally, the question is also presented here as to the duty of a federal court with respect to resolving doubtful questions of state law in such a way as to produce the most drastic of consequences—consequences which heretofore have not been wrought in any prior litigation of this nature.

This being a "voting rights" case, **Reynolds v. Sims**, 32 L. W. 4535, 4544, we think it anomalous that here the voting rights of **all** the citizens of Georgia are being not merely debased, but denied altogether, not by a malapportioned legislature, but by a federal court, the members of which were not voted on by anybody.

Moreover, the remedial relief complained of here was not prayed for by plaintiffs in their motion for further relief filed June 17, 1964. The first mention of such drastic relief came from one of the judges comprising the three-judge court on oral argument, whereupon, counsel for plaintiffs expressly disclaimed any desire for such relief.

Even when counsel for appellants proceeded to respond to the suggestion from the bench, he was admonished by another member of the Court, that no time need be consumed on this issue, because plaintiffs were not seeking such relief.

Notwithstanding, the court, *ex meru motu*, included two injunctive provisions in its proposed order of June 19 (Appendix A).

It was only thereafter that counsel for plaintiffs filed an amendment or "supplement" to the complaint, praying that the submission of the proposed Constitution be enjoined, apparently added out of fear that a court favorably inclined to their position would be otherwise offended if counsel did not ask for what the Court was obviously determined to grant them *nolens volens*.

Additionally, plaintiffs at no time have prayed for that part of the relief set forth in paragraph 3 of the injunctive order, and which undertakes to limit the authority of the 1965 General Assembly (Appendix C). This stands solely as relief desired by the Court itself.

(a) The Order Enjoining Submission of the Proposed Constitution.

In addition to the considerations of state law hereinafter referred to, the Court predicated this feature of its order on the reasoning that the ill-effects of a malapportioned legislature would be frozen into the Constitution which would, because of the two-thirds vote of both houses required by the Constitution, be difficult to eliminate in the future. But if this be the case, are not the people themselves just as capable of reaching this same conclusion and resolving the issue at the ballot box in November by the very means which the Court below has denied them? Have democratic processes become so destitute in this country that people can no longer be trusted with important policy decisions, but must have them resolved by the judicial bench? Aside from this, the Court resolved this issue on an assumption that was neither plead at the outset, supported by evidence, nor supplied by judicial notice. There was nothing whatever

before the Court which would justify a finding that the proposed Constitution had been "loaded" by a rural-dominated legislature in such a manner as to induce acceptance of undesirable features in order to gain desirable ones. A finding which is not based on evidence denies due process. **Thompson v. City of Louisville,** 362 U. S. 199, 4 L. Ed. 2d 654 (1960). Nor can judicial notice be taken of matters not called to the attention of the parties, for to do so would be "to turn the doctrine into a pretext of dispensing with a trial." **Garner v. Louisiana,** 368 U. S. 157, 7 L. Ed. 2d 207 (1961).

But beyond these considerations, the more basic question here is the power of the federal court, in effect, to assume a trusteeship over the internal workings of state government, hardly less drastic in nature than placing the state in a receivership.

At the outset, it is undisputed that legislation enacted by a malapportioned legislature is valid notwithstanding such unconstitutional apportionment, **Cedar Rapids v. Cox,** 252 Iowa 948, 964, 108 N. W. 2d 253, 262 (1961); **State v. Latham,** 190 Kan. 411, 375 P. 2d 788, 789 (1962); **Ryan v. Tinsley,** 316 F. 2d 430 (C. A. 10th 1963), cert. den. 375 U. S. 17 (1963); **United States ex rel. Watkins v. Pennsylvania,** 214 F. Supp. 913 (D. C. Pa. 1963); **Barnes v. Ladner,** 241 Miss. 606, 131 So. 2d 458 (1961); **People v. Clardy,** 334 Ill. 160, 165 N. E. 638 (1929); **Dixie Fireworks Co., Inc. v. McArthur,** 218 Ga. 735, 130 S. E. 2d 731 (1963), and see the remarks of Mr. Justice Douglas, concurring in **Baker v. Carr,** 369 U. S. 186, 250, 7 L. Ed. 2d 663 (1962), where it was said, "The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act (**Cedar Rapids v. Cox,** 252 Iowa 948, 964, 108 N. W. 2d 253, 262, 263; cf. **Kidd v. McCanless,** 200 Tenn. 273, 292 S. W. 2d 40) is plainly correct."

So being, a fortiori, a court is without power to enjoin the law-making process while in progress on identical grounds which would be insufficient to invalidate such legislation if enacted.

Even as to legislation deemed to be void, the Courts do not intervene until the enactment is complete.

In **Gaskins v. Dorsey**, 150 Ga. 638, 104 S. E. 433 (1920), it was said:

> "The judicial power will not be exerted to stay the course of legislation while it is in process of enactment; and this principle is applicable both to ordinary legislation and to the analogous course of an amendment to the constitution from the time of the introduction of the act proposing the amendment until the electors have acted."

See also, in accord, **Clayton v. Calhoun**, 76 Ga. 270 (1885); **Clements v. Roberts**, 230 S. W. 30, 144 Tenn. 129, reh. den. 231 S. W. 902, 144 Tenn. 152; **11 Am. Jur. 902**, Sec. 200; **16 C. J. S. 724**, Sec. 151 (1). The only exception is when the election itself would be illegal, in which case a taxpayer has standing to challenge the expenditure of public funds for holding an illegal election. See **Tolbert v. Long**, 134 Ga. 292, 67 S. E. 826 (1910), distinguished in the Gaskins case, supra.

As stated by this Court, "Litigation cannot arise until the moment of legislation is past." **Prentis v. Atlantic Coast Line Co.**, 211 U. S. 210, 228, 53 L. Ed. 150 (1908). The Court's function is "the more limited one of interpreting the law **as it now stands**," **Sinclair Refining Co. v. Atkinson**, 370 U. S. 195, 215, 8 L. Ed. 2d 440 (1962), and "The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order or ordinance." **McChord v. L. & N. Railroad Co.**, 183 U. S. 483, 496, 46 L. Ed. 289 (1902), and see **Drew v. Scranton**, 229 F. Supp. 308 (D. C. Pa. 1963).

In **League of Nebraska Municipalities v. Marsh**, 209 F. Supp. 189, 194 (D. C. Neb. 1962), the district court refused to enjoin submission of a proposed constitutional amendment reapportioning the Legislature, based upon plaintiffs' contention that the amendment itself was unconstitutional, the court declining to consider the validity of the amendment in advance of its submission.

And, in the **Lucas case**, 32 L. W. 4557, decided by this Court June 15, this court approved the action of the district court below in permitting submission of a Constitutional amendment proposed by a mal-apportioned legislature.

In **Reynolds v. Sims**, supra, where the district court had expressed an opinion that a proposed constitutional amendment was void for failing to meet federal requirements, the district court nevertheless did not enjoin its submission to the voters. See 208 F. Supp. 431. There is another obvious difference. There the Court expressed an opinion only with respect to a single measure designed as a compliance with the Court's opinion. Here, the Court has gone outside the confines of the pending litigation to adjudicate with respect to an entirely new constitution, the apportionment provisions of which undisputedly are valid under equal protection requirements.[1]

In all six of the state reapportionment cases decided by this Court on June 15, 1964, it was expressly recognized that there would be an interim period during which a legislature determined to be mal-apportioned nevertheless would be permitted to continue. In **Maryland Committee v. Tawes**, ... U. S. ..., 32 L. W. 4573, 4578, this court of its own volition approved a two-year delay in reap-

[1] Article 2, Sec. 3, Par. 1 of the proposed Constitution provides that, "The House of Representatives shall consist of not less than one hundred sixty-two nor more than two hundred sixteen members and the apportionment thereof shall be as provided by the General Assembly."

portionment, and in the Virginia case, **Davis v. Mann**, ... U. S. ..., 32 L. W. 4579, 4583, a delay of approximately 1½ years was approved. Yet in none of these cases was it suggested that during this interim period, the legislatures thus constituted would be without plenary legislative power. Any other doctrine immediately raises difficult questions. If a legislature lacks power to exercise **some** law-making authority, how can it logically exercise **any** authority? Or, considered differently, can a federal court exercise a veto over a legislature, approving that legislation which it approves and rejecting that which it disapproves, on non-legal grounds?

(b) **Determination of the State Law Question.**

In addition to predicating its enjoining of the submission of the state constitution on federal grounds, the Court relied in part upon its "pendent jurisdiction" by construing the Georgia Constitution, and concluding that the proposed constitutional revision procedure then in progress was void under state law. As interpreted by the Court, the Georgia Constitution limits the adoption of an entirely new constitution to the convention method.

The present constitution of Georgia, that of 1945, was adopted by the same procedure which was being followed with respect to the pending constitution.

In **Wheeler v. Trustees of Fargo Consolidated School District**, 200 Ga. 323, 331, 37 S. E. 2d 915 (1946), the 1945 Constitution was attacked on this identical ground. The Georgia Supreme Court rejected this contention, holding that the provisions of the Constitution of 1877 governing constitutional conventions were not to be construed as defining the only way by which an entirely new constitution could be submitted, but merely as limitations upon the convention method should it be employed. It was said:

"With this as the basis from which we reason, is it true that this provision of the constitution of 1877 limits the power of the sovereign people to a convention as the only means by which they can have a completely revised or new constitution? The language does not say so. The section purports to do nothing more than to place limitations upon the legislative branch of government as to the manner in which a convention can be called by this branch of the government. If we should say that the sovereign people themselves can adopt a new constitution by the convention method only, we would by implication be writing into this clause of the constitution a limitation on the sovereign power of the people. We do not hesitate to say that a court is never justified in placing by implication a limitation upon the sovereign. This would be an unauthorized exercise of sovereign power by the court."

If this were not enough, the identical contention relied upon by the Court below had previously been made in the public press several weeks earlier, instigated so we are advised, by certain rural interests.

In response to a request from the Governor, the Attorney General of Georgia had, on May 28, 1964, rendered an opinion upholding the procedure being followed, in which it was concluded:

"Moreover, the language of the Supreme Court quoted above and the reasoning there employed is such as to make it clear that the same rule applies regardless of whether the question is raised before or after the proposal is ratified by the people, for the basis of the Court's opinion is not some far-fetched notion of estoppel, but rather the proposition that the provisions of the existing Constitution governing con-

ventions do not operate as an implied exclusion of all other means, but merely as a limitation upon the convention procedure should it be invoked."

* * * * * * * *

"There is another reason, however, why the same rule applies regardless of whether the challenge is made before or after the ratification. If the procedure of submission is illegal, the fact that a proposal is ratified by the people does not cure the illegal submission. **Seago v. Richmond County**, 218 Ga. 151; **Higer v. Hanson**, 67 Idaho 45, 170 P. 2d 411 (1946); **Stovall v. Gartrell**, ... Ky. ..., 332 S. W. 2d 256 (1960). Consequently, if the contention urged here be valid, a different result would have been compelled in the **Fargo** case, supra.

Secondly, the argument urged against the present procedure completely overlooks the most basic and fundamental of all principles of constitutional law: a state constitution is not a delegation or grant or power, but is only a limitation of power. **11 Am. Jur. 619**, Sec. 18; **16 C. J. S. 189**, Sec. 70; Cooley, **Constitution Limitations**, p. 126 (7th Ed.); **Tripp v. Martin**, 210 Ga. 284, and cf. Constitution, Art. III, Sec. VII, Par. XX (Code, Sec. 2-1920). So construed, Art. XII, Sec. I, Par. II, is merely a limitation upon the convention procedure, and does not elevate it to the status of an **exclusive** method."

Unless the Supreme Court of Georgia should overrule the **Wheeler case**, there can be but one answer to the question at issue, and this answer necessarily is contrary to the one given by the Court below. The provisions of the 1877 Constitution under which the 1945 Constitution was adopted, are in all material respects identical to those of the 1945 Constitution. See "Appendix E." But even

assume that the question was arguable—and in this respect the district court below conceded as much.[2]

Consequently, it follows that the Court erred in undertaking to resolve independently a state law question with such drastic consequences as accorded here, for the doctrine of equitable abstention applies in such cases. **1A Moore's Fed. Prac.**, § 203, p. 2101; **City of Meridian v. Southern Bell Telephone & Telegraph Co.**, 358 U. S. 639, 3 L. Ed. 2d 562 (1959). The doctrine applies to civil rights cases with a racial context. **Harrison v. N. A. A. C. P.**, 360 U. S. 167, 3 L. Ed. 2d 1152 (1959), as well as to those involving apportionment. **Lucas v. The Forty-Fourth General Assembly of Colorado**, ... U. S. ..., 32 L. W. 4557, 4558, footnote 2; **Swanson v. Illinois**, 226 F. Supp. 699 (D. C. Ill. 1964). And, as more recently declared by this Court,

> "It is not for us, however, to decide this question of Maryland law, or to reach a conclusion as to how the Maryland Court of Appeals would decide it. Such a course would be inconsistent with our tradition of deference to state courts on questions of state law." **Bell v. Maryland**, ... U. S. ..., 32 L. W. 4664 (June 22, 1964).

(c) The Order Purporting to Limit the Authority of the 1965 General Assembly.

This injunctive order (Appendix C), granted without any pleadings or evidence whatever to support it, and without a single member of the General Assembly being made a party of record, in effect undertakes to tell the 1965 General Assembly what it can consider, and how long it can function, stated to be:

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[2] ". . . We do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as is the case here, proposed under conditions of doubtful legality . . . :" ("Appendix A").

> ". . . the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements and as may be necessary to permit the holding of elections to the newly constituted General Assembly. . . ."

It is difficult if not impossible to determine fully the extent of this order, and appellants doubt seriously whether the Court itself understood its scope. Since, strictly speaking the proposing of constitutional amendments is not "legislation", **11 Am. Jur. 632**, § 28, it seems doubtful that the 1965 General Assembly could propose constitutional amendments, unless paragraph 2 of the order be construed as so authorizing (See Appendix C).

In addition to the enactment of legislation, the General Assembly otherwise has authority to vote bills of impeachment,[3] conduct investigations, election contests,[4] elect and remove a state auditor,[5] and grant pardons or other relief for persons convicted of treason.[6] Yet if the injunctive order here complained of be valid, none of these functions could be performed. Nor is it for us to speculate[7] as to whether the Court below intended the order to have this effect. It has not yet so stated, and appellees, no more than appellants, can speak for the Court.

In addition to imposing limitations as to the **subject matters** which the House (and consequently, in most cases,

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[3] Constitution of Georgia, Art. III, Sec. VI, Par. III.

[4] Id., Sec. VII, Par. I; and see *Beatty v. Myrick*, 218 Ga. 629, 129 S. E. 2d 764 (1963).

[5] Ga. Code Ann., § 40-1801.

[6] Constitution of Georgia, Art. V, Sec. I, Par. XI.

[7] Appellees' Brief in Opposition to Motion for Stay, p. 12.

the Senate as well) may consider, the decree also undertakes to limit the **period** during which the House can function. While the decree contemplates that a reapportioned House need not necessarily take office until 1966, thereby requiring special elections in 1965, the plain intendment of the language of the decree is to prohibit the House from functioning at all after the regular 45-day session adjourns in early 1965.[8] This would preclude the convening of any special sessions of the General Assembly should the occasion arise, the appointment or functioning of any interim committees, and would even render illegal the expenditure of state funds to maintain the offices of the Speaker, Floor Leader and other officials. After adjournment of the 45-day session which convenes in January, state government would become paralyzed, and incapable of dealing with any emergency that might require immediate attention.

For the same reasons urged with respect to so much of the order as enjoined submission of the proposed new constitution, it is submitted that this part of the order is similarly erroneous. Both are predicated upon the assumption that because the Court can decree reapportionment, it can likewise supervise all phases of the internal affairs of the legislature pending compliance.

This, we submit, is not within the scope of relief contemplated by this Court's decisions of June 15th.

CONCLUSION.

When the first decision of the district court below was rendered in May, 1962, the State of Georgia reapportioned its state senate within the short period of approximately six months—a national record so far as we are able to determine. Now that the court has spoken again,

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[8] Constitution of Georgia, Art. III, Sec. IV, Par. III (Code Ann., § 2-1603, Supp.).

the state will in like manner move with all expedition to discharge its constitutional obligations at the earliest practical moment. Such fidelity to the Constitution should not be repaid during the interim with a harsh decree which virtually places the state in a receivership. The judgment below should be reversed.

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APPENDIX "A".

OPINION AND PROPOSED ORDER OF THE COURT OF JUNE 19, 1964.

Following the publication of opinions by the United States Supreme Court on Monday, June 15, 1964, in the case of Reynolds v. Sims, et al., and companion cases dealing with the apportionment of seats in the Legislatures of the states of Alabama, New York, Maryland, Virginia, Delaware and Colorado, the plaintiffs have moved for further immediate relief to be made effective before the elections now scheduled to be held in November of this year to the General Assembly of the State of Georgia.

In our earlier order we held:

> "Viewing the extreme disparities existing in both Houses of the Legislature, against the background of the several factors which we have taken into consideration, we are forced to the conclusion that the present composition of the Georgia Legislature amounts to invidious discrimination against the plaintiffs and all others who are residents of the counties in which plaintiffs reside."

We then held that the Georgia Legislature as thus constituted was illegally apportioned so long as it was composed of two Houses, neither of which was apportioned according to population. We then said:

> "We do not find any authoritative decision by the Supreme Court that causes us to require that in order to give the plaintiff his constitutional rights the State Legislature must be constituted of two Houses, both of which are elected according to population.
>
> ". . . It is not necessary for us at this time to make

a final determination on the question whether, if one House of the General Assembly of Georgia is elected according to population, the other House may remain **as completely unrelated to population ratios as it is today.**" (Emphasis added.)

This Court then retained jurisdiction for the entry of such other and further orders as might be required.

In its decision in the Reynolds case, the Court held that "as a basic constitutional standard, the Equal Protection clause requires that the seats in both houses of bi-cameral state legislatures must be apportioned on a population basis."

The Court added further that "the Equal Protection clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."

In our earlier order we especially noted the disparity of representation between the 1-vote and the 3-vote counties. This disparity appears as its most extreme dimensions by contrasting Echols County, which has one representative and a population of 1876, with Fulton County with its three representatives for 556,326 persons—one representative per 1,876 in Echols, as contrasted with 1 representative per 185,442 in Fulton, a disparity of approximately 100 to 1 as between the most populous and the least populous counties of the state.

It is thus plain to all that the present Legislature is constituted in such a manner as to violate the constitutional rights of the plaintiffs and the class which they represent. The question now posed by the present motion is: What is required to give the under-represented citizens of the State their legal due? There is then the further question: How quickly should this relief be granted?

With rare exceptions, the Courts declare the legal rights of the parties as of the time of the Courts' decisions. It is somewhat of a novelty in constitutional law for a court to find that a party is being deprived of constitutional rights, but that he is not entitled to immediate vindication of such rights. Well-known exceptions are the school desegregation cases, Brown et al. v. Board of Education of Topeka, 347 U. S. 483, and 349 U. S. 294, and B. A. Reynolds etc., et al., v. M. O. Sims, et al., dec. June 15, 1964. 32 L. W. 4535, and companion cases decided this week. In Reynolds v. Sims the Court, after making it plain that each House of a bicameral legislature must be apportioned as nearly as practicable in accordance with population, said:

> "It would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent, and a state's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles."

It is plain that the Supreme Court considered it to be the unusual case that would deny all relief to the underrepresented citizen who had brought his action sufficiently far in advance of an election to warrant the court's granting immediate relief. The respondent Secretary of State

here contends that this is such an unusual case and that the court should not interpose any injunctive relief until after the State Legislature is given an opportunity at its regular session in 1965 to set its own house in order.

Under existing laws certain prospective candidates for election to the House of Representatives for Georgia have already met all of the party qualifications necessary to have their names on the ballot in the fall elections. Moreover, we are advised that the entry dates for qualification as candidates for the Democratic Party Primary have already been closed and entrance fees have already been paid. Although it would be physically possible for a time-table to be devised under which an additional special session of the Georgia Legislature might be called into session and a reopening of the lists for qualifying new candidates could be arranged, and primaries could be held in time for a properly apportioned Legislature to be elected in November, 1964, the Court concludes that adequate protection of the rights of plaintiffs and their class can be afforded without so greatly interfering with the normal election procedures in this election year.

The Georgia Legislature is now in extraordinary session. It was called for limited purposes, and it is limited by law to consideration of the objects for which it was called. Principal among these are (1) the adoption of new election laws, and (2) the proposing of a new State Constitution. In a very real sense these two Legislative objectives are of paramount interest to every resident of Georgia—much more so than the usual run of legislative acts of a session of the General Assembly. The reason for this is plain. The election laws that are under consideration will control the future elections in the state of Georgia, including the elections at which the members of the legally apportioned legislature are to be elected. As relates to the constitution, it will be the basic law of

the state until and unless amended in the future. Such future amendment can be proposed only by a two-thirds vote of the two houses of a properly apportioned General Assembly.

Thus, we must necessarily decide whether it is consistent with the Supreme Court's mandate for the Court to stand aside and permit this improperly constituted legislative body to enact the new election code for the state, and also to perform legislative acts necessary to propose a new constitution for the state of Georgia. So far as the election laws are concerned, these would be readily subject to amendment or repeal by a simple majority of both houses of the properly apportioned General Assembly. However, the matter of the constitution presents a more serious problem. We emphasize the significance of this point, because of the Georgia constitutional policy, as expressed in the Georgia constitution since 1868, providing that a new constitution of the state of Georgia, if proposed by a constitutional convention, **must be by a convention whose members are selected on the basis of population.**[1]

There is no provision in the Georgia Constitution for the adoption of an entirely new constitution by action of the state legislature followed by approval of the voters at a General Election. We recognize that, nevertheless, in 1945, this procedure was followed and the present special session of the General Assembly is pointing toward the same end. The validity of this procedure was brought in question after the election in 1945 was carried in favor of the new constitution. The Supreme Court of

[1] The Georgia Constitution provides, Section 2-8102: "No convention of the people shall be called by the General Assembly to revise, amend, or change this Constitution, unless by the concurrence of two-thirds of all members of each House of the General Assembly. *The representation in said convention shall be based on population as near as practicable. . . .*" (Emphasis added.)

Georgia found that the new constitution was duly approved and in effect on reasoning which appears to have been based on the fact that once the election was held and the people approved the draft amendment, it could not be nullified or set aside. See **Wheeler v. Trustees of Fargo District**, etc., 200 Ga. 323, 37 S. E. 2d 322. The Georgia Supreme Court has not held that the legislature has the power to propose a new constitution for adoption in the manner in which it proceeded in 1945 and in the manner in which the present session of the legislature is proceeding. It appears that such procedure is in conflict with the basic principle announced in the Georgia constitution to the effect that the adoption of a new constitution must be the work of a constitutional convention constituted by representatives of the people based on population "as near as practicable."

Thus, while we feel it appropriate in the exercise of the judicial function to permit the General Assembly to reapportion itself, since the guidelines now established by the Supreme Court are plain and simple, we do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as is the case here, proposed under conditions of doubtful legality by a malapportioned legislative body.

An accommodation between the relief which would permit the Legislature to reapportion itself, and yet which would leave to such reapportioned Legislature the performance of its legislative duty looking towards the adoption of a new constitution, can, we think, be accomplished by our entering an order along the following lines:

(1) The provisions of Article III, Sec. III, paragraph I, of the Constitution of the State of Georgia of 1945

(Ga. Code 2-1501), are void because they are in conflict with the Fourteenth Amendment to the Constitution of the United States.

(2) The provisions of Georgia Code Section 47-101, as amended (Acts 1921, p. 229; 1931, p. 48; 1941, p. 348; 1951, pp. 26-27; 1953, pp. 10-11, and 1961, p. 111) are void because they are in conflict with the Fourteenth Amendment of the Constitution of the United States.

(3) The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted.

(4) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that the service of the members of the General Assembly of the state of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 45-day session, as provided in the Georgia constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements, and as may be necessary to permit the holding of elections to the newly constituted General Assembly.

In order that the Court may be fully apprised of the effect which such an order would have on the proper functioning of the state government, and the holding of the elections this year, it is

Ordered that the defendants show cause, if any they have, on the 24th day of June, 1964, at 2:00 P. M., why the foregoing order should not be entered by this Court.

This 19th day of June, 1964.

/s/ Elbert P. Tuttle,
Elbert P. Tuttle,
United States Circuit Judge.

/s/ Griffin B. Bell,
Griffin B. Bell,
United States Circuit Judge.

/s/ Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

APPENDIX "B".

ORDER OF THE COURT OF JUNE 24, 1964.

Order.

The Court having heard oral argument on the order to show cause entered by it on the 19th day of June, 1964, and being advised in the premises,

It is now Ordered, Adjudged and Decreed as follows:

(1) Article III, Section III, Paragraph I (Code, Section 2-1501) of the Constitution of Georgia of 1945, and Section 47-101 of the Code of Georgia, as amended, are hereby declared to be prospectively null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States, for elections to the House of Representatives after the General Election to be held in November, 1964.

(2) The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted; provided, however, nothing in this order shall prevent the submission of amendments to the Constitution of the state of Georgia which are separate as to subject matter, in accordance ith Article XIII, Section I, Article 1, of the Constitution of the state of Georgia, 1945. (See **Hammond v. Clarke**, 136 Ga. 313, for a discussion by the Georgia Supreme Court of what constitutes separate amendments.) Nor shall anything in this order prevent the calling by the General Assembly of a "convention of the people to revise, amend or change

the constitution" if the representation "in the convention is based on population as near as practicable" with the members being elected by the people (see Article XIII, Section I, Article 2). Constitution of the State of Georgia, 1945.

(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that the service of the members of the General Assembly of the state of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements, and as may be necessary to permit the holding of elections to the newly constituted General Assembly.

The Court will retain jurisdiction of this cause for such other and further orders as may be necessary.

This 24th day of June, 1964.

/s/ Elbert P. Tuttle,
Elbert P. Tuttle,
United States Circuit Judge.

/s/ Griffin B. Bell,
Griffin B. Bell,
United States Circuit Judge.

/s/ Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

APPENDIX "C".

FINAL ORDER OF THE COURT OF JUNE 30, 1964.

Revised Order.

All parties having consented thereto, the order of the Court dated June 24, 1964, is hereby revised to read as follows:

It is now Ordered, Adjudged and Decreed as follows:

(1) Article III, Section III, Paragraph I (Code Section 2-1501) of the Constitution of Georgia of 1945, is hereby declared to be null, void and inoperative as being in conflict with the Fourteenth Amendment to the Constitution of the United States.

Section 47-101 of the Code of Georgia, as amended, is hereby declared to be prospectively null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States for elections to the House of Representatives after the General Election to be held in November of 1964.

(2) The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted; provided, however, nothing in this order shall prevent the submission of amendments to the Constitution of the State of Georgia which are separate as to subject matter, in accordance with Article XIII, Section I, Article 1, of the Constitu-

tion of the State of Georgia, 1945. (See **Hammond v. Clarke,** 136 Ga. 313, for a discussion by the Georgia Supreme Court of what constitutes separate amendments.) Nor shall anything in this order prevent the calling by the General Assembly of a "convention of the people to revise, amend or change the constitution" if the representation "in the convention is based on population as near as practicable" with the members being elected by the people (see Article XIII, Section I, Article 2). Constitution of the State of Georgia, 1945.

(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that notwithstanding anything in Article III, Section IV, Paragraph I (Code Section 2-1601) of the Constitution of Georgia of 1945 to the contrary, the service of the members of the House of Representatives of the General Assembly of the State of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements and as may be necessary to permit the holding of elections to the newly constituted General Assembly, said elections to be held at such times as may be necessary to permit the Members of such General Assembly to take office as soon as practicable, but in no event later than the second Monday in January, 1966.

The Court will retain jurisdiction of this cause for such other and further orders as may be necessary.

This 30th day of June, 1964.

Elbert P. Tuttle,
Elbert P. Tuttle,
United States Circuit Judge.

Griffin B. Bell,
Griffin B. Bell,
United States Circuit Judge.

Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

APPENDIX "D."

Constitutional and Statutory Provisions Governing Apportionment of Members of the House of Representatives of the General Assembly of Georgia.

Georgia Constitution of 1945, Article III, Sec. III:

Paragraph I.—**Number of representatives.**—The House of Representatives shall consist of representatives apportioned among the several counties of the State as follows: To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each.

Paragraph II.—**Apportionment changed, how.**—The above apportionment shall be changed by the General Assembly at its first session after each census taken by the United States Government in accordance with the provisions of Paragraph I of Section III of this Article.

Georgia Code Ann.:

47-101.—**House of Representatives; membership apportioned.** The membership of the House of Representatives shall be as follows: Three members each from the counties of Fulton, DeKalb, Chatham, Muscogee, Bibb, Richmond, Cobb, Dougherty; two members each from the counties of Floyd, Hall, Lowndes, Troup, Clayton, Clarke, Walker, Gwinnett, Whitfield, Glynn, Houston. Carroll, Spalding, Thomas, Ware, Baldwin, Colquitt, Laurens, Coweta, Bartow, Coffee, Polk, Decatur, Sumter, Bulloch, Upson, Tift, Cherokee, Catoosa, Newton; and one member each from each of the other counties of the State.

APPENDIX "E".

Constitutional Provisions Governing Amendment and Revision of the State Constitution.

I.

Constitution of 1877, Art. XIII, Sec. I.

Paragraph I. **Proposal by General Assembly; submission to people.** Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon. And the General Assembly shall cause such amendment or amendments to be published in one or more newspapers in each Congressional District, for two months previous to the time of holding the next general election and shall also provide for a submission of such proposed amendment or amendments, to the people at said next general election, and if the people shall ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of this Constitution. When more than one amendment is submitted at the same time they shall be so submitted as to enable the electors to vote on each amendment separately.

Paragraph II.—**Convention, how called.** No Convention of the people shall be called by the General Assembly to revise, amend or change this Constitution, unless by the concurrence of two-thirds of all the members of each house of the General Assembly.. The representation in said convention shall be based on population as near as practicable.

Note: The Georgia Constitution was adopted under the 1877 Constitution by a procedure set forth and held legal in **Wheeler v. Board of Trustees of Fargo Consolidated School District**, 200 Ga. 323, 37 S. E. 2d 322 (1946). The identical procedure is being employed with respect to the proposed new state constitution, enjoined by the district court below.

II.

Constitution of 1945, Art. XIII, Sec. I.

Paragraph I.—**Proposal by General Assembly; submission to people.** Any amendment to this Constitution may be proposed by a resolution in the Senate or the House of Representatives, and if the same shall be agreed to by two-thirds of the members elected to each branch of the General Assembly, such proposed amendment shall be entered on the journals of each branch with the Ayes and Nays taken thereon. Any proposed amendment may be repealed or amended by the same General Assembly, if done so at least two months prior to the date of the election at which such proposed amendment is to be submitted.

The Governor, the Attorney General, and the Secretary of State shall meet and determine whether a proposed amendment is general, and if not general, shall determine what political subdivision or subdivisions are directly affected by such proposed amendment. If a proposed amendment is general, the Governor shall cause such proposed amendment to be published in full once each week for three consecutive weeks immediately preceding the date of the election at which such proposed amendment is submitted, in one newspaper of general circulation in each Congressional district of the State. If such proposed amendment is not general, the Governor shall cause such

proposed amendment to be published in full in one newspaper of general circulation in each county in which the directly affected political subdivision or subdivisions are located. In the event no such newspaper is located in such county, a newspaper in an adjoining county shall be used.

Any proposed amendment which is general shall be submitted to the people of the entire State at the next general election at which members of the General Assembly are elected, and if ratified by a majority of the electors qualified to vote for members of the General Assembly voting thereon, such amendment shall become a part of this Constitution. A proposed amendment which is not general shall only be submitted to the people of the political subdivision or subdivisions directly affected. The votes of the electors in each political subdivision affected shall be counted separately in determining whether such proposed amendment is ratified, and it must be ratified by a majority of the electors qualified to vote for members of the General Assembly voting thereon in each such political subdivision before it shall become a part of this Constitution. The General Assembly, in the resolution, shall state the language to be used in submitting the proposed amendment.

When more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately.

Paragraph II—**Convention, how called.** No convention of the people shall be called by the General Assembly to revise, amend or change this Constitution, unless by the concurrence of two-thirds of all members of each house of the General Assembly. The representation in said convention shall be based on population as near as

practicable. This Constitution shall not be revised, amended, or changed by the Convention until the proposed revision, amendment, or change has been submitted and ratified by the people in the manner provided for submission and ratification of amendments proposed by the General Assembly.

Paragraph III--**Veto not permitted.** The Governor shall not have the right to veto any proposal by the General Assembly to amend the Constitution.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964

No. 300

BEN W. FORTSON, JR., as Secretary of State, State of Georgia, JAMES F. WHITE, Ordinary of Fayette County, Georgia, A. B. TOLLISON, Ordinary of Forsyth County, Georgia, ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia, and JIM W DICKERSON, Ordinary of Cherokee County, Georgia,
Appellants,

vs.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

MOTION TO AFFIRM

and

BRIEF OF APPELLEES IN SUPPORT OF MOTION

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. .....

BEN W. FORTSON, JR., as Secretary of State, State of Georgia, JAMES F. WHITE, Ordinary of Fayette County, Georgia, A. B. TOLLISON, Ordinary of Forsyth County, Georgia, ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia, and JIM W. DICKERSON, Ordinary of Cherokee County, Georgia,
Appellants,

vs.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

MOTION OF APPELLEES TO AFFIRM.

Under the authority of Rule 16 of this Court appellees move to affirm the order and decree of the three-judge federal district court sought to be reviewed on this appeal on the ground that it is manifest that the questions on which the decision depends are so unsubstantial as not to need further argument.

BRIEF OF APPELLEES IN SUPPORT OF MOTION.

STATEMENT OF FACTS.

This action was brought in 1962 by appellees, residents of the two most populous counties in Georgia, for themselves and others similarly situated, seeking reapportionment of both houses of the Georgia legislature. The district court, in **Toombs v. Fortson**, 205 F. Supp. 248 (N. D. Ga. 1962), found the disparities existing in both houses to be so extreme as to amount to invidious discrimination against the class represented by appellees. It ordered the prompt reapportionment of one house and held that it was not necessary at that time to make a final determination whether the other house could remain completely unrelated to population ratios. The court retained jurisdiction for the entry of such further orders as might be required. In compliance with the order the Georgia Senate was reapportioned in October, 1962.

On June 17, 1964, two days after the decision of this Court in **Reynolds v. Sims**, ... U. S. ...., 84 S. Ct. 1362 (1964), and its companion cases, appellees moved in the district court to compel reapportionment of the House of Representatives of the Georgia General Assembly prior to the November 1964 general election. Under the existing apportionment representatives from the 103 least populous counties of the State, constituting a constitutional majority of the 205 members of the House of Representatives, represent counties having approximately 22-1/2% of the population of Georgia. A voter in Echols County has 100 times the effective representation in the House of Representatives of those who reside in Fulton County which, with over 14% of the State's total population, is represented by only 3 of the 205 members of the

House. The inequalities in the apportionment of the house are more fully described in the district court's initial opinion in **Toombs v. Fortson**, *supra*, and are identical with the disparities existing under the Georgia county-unit system which was struck down by this Court in **Gray v. Sanders**, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963).

At the hearing in the district court, appellants made no attempt to defend the constitutionality of the system under which the House of Representatives has been apportioned for more than 96 years.[1] Appellants asked only that reapportionment be delayed until after the election of a new General Assembly in November 1964 for regular two-year terms.

At the time of the hearing in the district court the Georgia General Assembly was convened in extraordinary session to prepare a new constitution in the form of a single "amendment" to the existing constitution for submission to the people for ratification at the November 1964 general election.

Following hearings on June 19 and 24, 1964, the district court entered an order in which it permitted a new General Assembly to be elected at the general election in November 1964 and permitted reapportionment be deferred until 1965. During the interim, however, appellants, who are state election officials, were enjoined from placing the question whether an entirely new constitution should be adopted in the form of an amendment to the present constitution on the ballot in any election pending reapportionment of the General Assembly. The

[1] In their jurisdictional statement, page 5, appellants concede that the question of apportionment standards under the Fourteenth Amendment is not in issue here, and they expressly do not appeal from so much of the decree of the district court as requires that the House be reapportioned on a population basis.

injunction expressly authorized the submission to the electorate of individual constitutional amendments, separate as to subject matter, in accordance with Article XIII, Section 1, Paragraph 1 (Ga. Code Section 2-8101) of the Georgia Constitution. The order also permitted the calling of a constitutional convention of delegates elected by the people on the basis of population, as provided by the Georgia Constitution.

QUESTIONS PRESENTED.

I. Whether the district court failed to act in accordance with general equitable principles in enjoining appellants from submitting to the electorate an entirely new state constitution proposed by the grossly malapportioned Georgia legislature during the interim prior to reapportionment.

II. Whether the district court correctly held, as a matter of state law that the Georgia legislature has no authority to propose to the electorate an entirely new state constitution.

III. Whether it is manifest that the foregoing questions, on which the decision of the district court depends, are so unsubstantial as not to need further argument.

ARGUMENT.

I.

In deferring the immediate relief that it could have granted to appellees, the district court took local conditions into account as contemplated by this Court in Reynolds v. Sims, infra, and acted and relied on general equitable principles in enjoining the submission of an entirely new constitution to the voters in the form of an amendment pending reapportionment.

Under the rationale of **Reynolds v. Sims**, ... U. S. ..., 84 S. Ct. 1362 (1964), an order requiring immediate reapportionment of the second house of the General Assembly would have been clearly appropriate. There this Court emphasized that "once a state's legislative apportionment scheme has been found to be unconstitutional it would be the **unusual** case in which a court would be justified in not taking appropriate action to insure that **no further elections are conducted under the invalid plan.**" (Emphasis supplied.) Although this Court recognized that relief might be withheld under certain circumstances it expressly held in that case that the district court acted with proper judicial restraint when, on July 21, 1962 (a month later than in the present case), it ordered immediate reapportionment of the Alabama legislature "at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty," notwithstanding that all candidates had been nominated in party primaries held in May.

Although only a part of the candidates for election to the Georgia House of Representatives had been nominated in Democratic party primaries[1] held prior to the date of

[1] No Republican candidates for election to the House of Representatives had been nominated

the hearings below, the district court, in deference to appellants' request for more time, declined to require that the House be reapportioned prior to the November 1964 general election.[2]

(a) The District Court Balanced the Equities.

After weighing the competing equities the district court concluded in its order of June 19, 1964, "that adequate protection of the rights of plaintiffs and their class can be afforded without so greatly interfering with the normal election procedures in this election year." It considered that under the mandate of this Court in **Reynolds**, *supra*, a court of equity could not "stand aside" and permit the "improperly constituted legislative body" to submit to the voters an entirely new constitution that could subsequently be changed only by amendment proposed by "a two-third vote of the two houses of a properly apportioned General Assembly."[3]

Appellants argued to the district court that an injunction against submission of the proposed constitution to the electorate would deprive the State of power to deal with important problems of urban renewal, rapid transit and other urgent matters. In response, the district court, as an "accommodation between the relief which would permit the Legislature to reapportion itself and yet which

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[2] Previously, in *Toombs v. Fortson*, 205 F. Supp. 248 (N. D. Ga. 1962), the district court, in September 1962, required reapportionment of the Georgia Senate prior to the November 1962 general election.

[3] Appellants' assertion at page 10 of their jurisdictional statement that appellees did not desire injunctive relief is patently in error. A specific prayer to enjoin the malapportioned General Assembly from proposing a new constitution to the electorate was not included in the original complaint, because no proposed constitution was then pending. When it was observed at the hearing on June 19, 1964 that such injunctive relief was beyond the scope of the complaint, appellees promptly filed an amendment specifically requesting such relief.

would leave to such reapportioned Legislature the performance of its legislative duty looking toward the adoption of a new constitution,"[4] expressly provided that "nothing in this order shall prevent the submission [to the people] of amendments which are separate as to subject matter, in accordance with Article XIII, Section I, Paragraph I, of the Constitution of the State of Georgia, 1945."[5]

As this Court emphasized in **Reynolds v. Sims**, *supra*:

> "Remedial technique in this new and developing area of the law will probably differ with the circumstances of the challenged apportionment and a variety of local conditions."

To guide the district courts in moulding their decrees this Court quoted from the concurring opinion of Mr. Justice Douglas in **Baker v. Carr** that "any relief accorded can be fashioned in the light of well-known principles of equity."[6]

This Court's directions to the district courts in the present area are remarkably similar to those in the school cases. There, the Court said:[7]

> "Full implementation of these constitutional principles may require solution of varied local school problems . . . In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public

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[4] Appendix "A", page 27, of appellants' jurisdictional statement.

[5] Appendix "B", page 30, and Appendix "C", page 32, of appellants' jurisdictional statement.

[6] 369 U. S., at 250, 82 S. Ct., at 727.

[7] *Brown v. Board of Education*, 349 U. S., at 299-300, 75 S. Ct., at 756.

and private needs. These cases call for the exercise of these traditional attributes of equity power."

In the present case the district court, having rejected the prayer of the appellees for immediate relief, followed the mandate of this Court to act and rely on general equitable principles and provided an "accommodation" to safeguard the interests of appellees and their class during the continued suspension of their constitutional rights while the decree is being carried out. In so doing the Court applied the undoubted power of a court of equity to "prescribe the performance of conditions designed to protect the rights of the parties pending appeal . . . or to protect temporarily the public interest while its decree is being carried into effect." **Central Kentucky Natural Gas Co. v. Railroad Commission**, 290 U. S. at 271, 54 S. Ct. at 157 (1933). See 19 Am. Jur. 51, § 22.

It is an underlying assumption of appellants in their jurisdictional statement that when the district court has ordered reapportionment by a date fixed in accordance with **Reynolds** it has exhausted its equity power and can take no further action in formulating its decree to protect the rights of the parties or the public interest from irreparable injury during the interim. We submit that any such assumption is contrary to both the letter and spirit of the **Reynolds** decision. The traditional flexibility and capacity of a court of equity are not so restricted, particularly when vindication of the admitted constitutional rights of a majority of the citizens of the State must continue to be postponed.

(b) Injunction Necessary to Prevent Irreparable Damage.

The issuance of the injunction was clearly necessary to prevent irreparable injury to the plaintiffs and their class until reapportionment of the House of Representatives is accomplished. Similar relief was granted by

the district court in the **Reynolds** case. As this Court observed, the district court prevented the proposed 67-senator amendment from being placed on the ballot for ratification at the general election by invalidating it prospectively. See Footnote 48 to **Reynolds**, 84 S. Ct. at 1386.[8]

It cannot be seriously disputed that by far the most important stage in the adoption of a new constitution is that of drafting the basic principles to be included within its provisions. After adoption of a constitution by the legislature, the people can only accept or reject it in its entirety—they are without power to rewrite the document submitted to them, no matter how odious individual provisions may be. On precisely these facts the Supreme Court of California said in **McFadden v. Jordan**, 32 Cal. 2d 330, 196 P. 2d 787, 796 (1948):

> "The proposal is offered as a single amendment but it obviously is multifarious. It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from the electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accept

[8] See also *Livermore v. Waite*, 102 Cal. 113, 36 Pac. 424 (1894) and *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P. 2d 787 (1948), where the Supreme Court of California enjoined the State's election officials from submitting a new constitution to the voters.

Although the cases of *Clayton v. Calhoun*, 76 Ga. 270 (1885) and *Gaskins v. Dorsey*, 150 Ga. 638, 104 S. E. 433 (1920), cited by the appellants at page 13 of their jurisdictional statement declare a rule of general application, as the Supreme Court of Georgia said in *Tolbert v. Long*, 134 Ga. 202, 204, 67 S. E. 826 (1910), "an exception has been recognized to the general principle, where the constitutional rights of a citizen and a taxpayer are sought to be evaded by an attempt to make an unconstitutional or inapplicable law operative through the means of popular election. (Citations omitted)."

> ing the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all. Such appeal might well be proper in voting on a revised constitution, proposed under the safeguards provided for such a procedure, but it goes beyond the legitimate scope of a single amendatory article."

To be unfairly excluded from this initial stage in the formulation of a new constitution is to be cut off from the very well-springs of government. At this point in the political process, more than at any other, to the extent that an individual is inadequately represented "he is that much less a citizen." See **Reynolds v. Sims**, 84 S. Ct., at 1384.

It is no answer that the constitution which has been proposed by a malapportioned General Assembly will be submitted in its entirety for ratification by the people at the general election. As this Court emphasized in **Lucas**, "an individual's constitutionally protected right [to full and effective participation in the political processes of the State's legislative bodies and] to cast an equally weighted vote may not be denied even by a vote of a majority of a State's electorate. . . ." **Lucas v. Forty-Fourth General Assembly of Colorado**, . . U. S. . , 84 S. Ct. 1472, at 1486 (1964). As the district court observed in the present case, a constitutional provision adopted by an invalidly apportioned legislature, unlike an ordinary statute, cannot be changed after reapportionment by a simple majority. The fact that the proposed constitution can be amended only by a two thirds vote of both Houses effectively locks the provisions into the document.

Appellants have chosen to ignore in their argument the fact that the district court was careful to leave open the power to propose and adopt constitutional amendments or even an entirely new constitution by means

less likely to result in irreparable injury to the right of the plaintiffs to participate in the political processes of republican government. The appellants were expressly authorized to place individual amendments on the ballot, separated as to subject matter as required by the Georgia Constitution (Article XIII, Section I, Paragraph I, Ga. Code Sec. 2-8101), for acceptance or rejection by the people on an individual basis. The order further stated that it should not prevent the General Assembly from calling a "convention of the people to revise, amend or change the constitution" in which convention, representation is "based on population as nearly as practicable" in accord with Article XIII, Section I, Paragraph II, of the Georgia Constitution (Ga. Code Sec. 2-8102). The state has full power to amend the present constitution in any respect which it may deem necessary or appropriate. The only restriction imposed by the order of the district court is to require that it do so in a manner which is not unduly destructive of the rights of the class represented by appellees during the interim period prior to the time that they are fully and adequately represented in both houses of the General Assembly.

(c) **Attacks Made by Appellants Are Not Valid.**

Much of the argument in Division (a), page 11, of their jurisdictional statement is misplaced in the context of the present case.

Their contention that the order of the district court subverts the democratic process has been resolved to the contrary by **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); and **Reynolds v. Sims**, *supra*.

Their logic in asserting that since a legislature, although unconstitutionally malapportioned, retains the power to enact valid legislation, a court is without power to enjoin law-making process is, we submit, neither sound

nor relevant to the solution of the unique and difficult problem facing the district court in this case.

This Court has just announced that "it would be the unusual case" in which further elections would be permitted under the invalid plan. The existing apportionment involved discrimination as great as 100 to 1 against appellees, as shown above. The constitutional rights of the citizens of the more populous counties have long been denied. The court had the clear power to order immediate reapportionment. On the other hand, the governor of Georgia had personally appeared, *amicus curiae*, to urge that reapportionment be postponed until after the election of a new General Assembly for a two-year term. The "moment of legislation" had passed by the time of the hearing on June 24th. Conscious of local conditions as contemplated in **Reynolds**, the district court took this Court at its word and fashioned a decree that took into account, on one hand, the continued suspension of the admitted rights of the appellees and, on the other, the alleged need of the State for more time to reapportion.

If the district court had doubted its power to balance the equities by restraining the adoption of an entirely new constitution until reapportionment could be accomplished, it might well have ordered reapportionment by late summer or early autumn, 1964, as it had done in 1962 and as the district court in Alabama had done in **Reynolds**.

The activity of the General Assembly in preparing a new constitution cannot be considered as "legislation", as is demonstrated in **Wheeler v. Trustees of Fargo Consolidated School District**, 200 Ga. 323, 37 S. E. 2d 322 (1946), *infra*, in Division II of this brief.[9]

[9] The Supreme Court of Georgia held in *Wheeler*, 200 Ga., at 332, 37 S. E. 2d, at 328, that in drafting a new constitution to be

Appellants assert that unless the district court's injunction is stayed, the case will become moot after the middle of September. Although the order would have the effect of postponing a vote on the proposed constitution in November 1964, nothing will prevent its submission for ratification at a subsequent election after reapportionment has been accomplished. In contrast, however, should the decision of the lower court be reversed and the constitution placed on the ballot and ratified prior to the reapportionment of the House of Representatives, its provisions would be locked in as long as the rural minority can defeat a two-thirds vote to amend. As this Court said in **Jones v. Montague**, 194 U. S., at 153 (1904): "The thing sought to be prohibited has been done and cannot be undone by any order of the Court." Thus, should the injunction ordered below be eliminated, appellees will be completely without recourse.

Since appellants admit that the apportionment of the Georgia House of Representatives is unconstitutional, the only objective of their motion and jurisdictional statement is to stay the injunctive relief granted by the district court to protect the interest of appellees and their class until reapportionment is carried out by January, 1966. If the injunction were dissolved, not only would the delicate balance of equities be destroyed but there would be other unfortunate side effects that the district court, being close to the situation, can more readily foresee and evaluate than this Court. For example, since the district court enjoined its submission in November 1964, there has been little or no public interest in or discussion of the proposed constitution. If the injunction

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submitted to the people in the form of an amendment to the existing Constitution, the Georgia legislature had no more authority than "an assemblage of private citizens." The validity of the new constitution, after being adopted, stemmed not from the "framing or submission of the instrument" but from the "fiat" of the people

were dissolved in September, as urged by appellants, there would not remain sufficient time for the public to study and debate its detailed and complex provisions. Thus the injunction, intended by the district court as an instrument to protect the interest of appellees and mitigate the continued postponement of their Fourteenth Amendments rights, might, if lifted at a date near the general election, be the proximate cause of the adoption of the constitution which, if adequate time had been provided for study and debate, would have been rejected by the voters.

II.

The district court correctly held, as a matter of state law within its ancillary jurisdiction, that the Georgia legislature has no authority to propose to the electorate an entirely new state constitution in the form of an amendment to the present Constitution.

In their jurisdictional statement appellants contend that the order of the district court with respect to the authority of the General Assembly to propose a new constitution is contrary to the decision of the Supreme Court of Georgia in **Wheeler v. Board of Trustees of Fargo School District**, 200 Ga. 323, 37 S. E. 2d 322 (1946). The district court did not so construe its order. See pages 26-27, Appendix "A" to appellants' jurisdictional statement. A reading of **Wheeler** will demonstrate the correctness of the district court's analysis of that decision.

Although the present Georgia Constitution confers on the legislature the power to propose **amendments**, the legislature has no power to propose a **new** or **revised** constitution (Article XIII, Section I, Paragraph I, Ga. Code, Sec. 2-8101). The people have reserved to themselves the

power to "revise" the Constitution by constitutional convention (Article XIII, Section I, Paragraph II, Ga. Code, Sec. 2-501 and 2-8102). The legislature may propose changes in the constitution only when such changes constitute amendments as distinguished from a revision of the entire instrument. The same was true under the Constitution of 1877. The legislature in proposing the Constitution of 1945 recognized that limitation and sought to avoid it by offering the new constitution in the guise of an amendment.[10] That device was clearly recognized by the Supreme Court of Georgia in **Wheeler** where it said:[11]

> "We conclude that the instrument . . . is not an amendment to the Constitution of 1877; but on the contrary it is a completely revised or new Constitution."

In **Wheeler** the Court compared the role of the Georgia legislature to that of the convention that drafted the Constitution of the United States and quoted Pomeroy's **Constitutional Law** as follows:[12]

> "'. . . . but they [the members of the convention] knew that their labors were only to be suggestions; and that they as well as any private individuals, and

[10] In the present situation the General Assembly and Governor undertook the "amendment" to the Georgia Constitution with full knowledge of their probable lack of authority to do so. As shown on page 16 to appellants' jurisdictional statement, the Attorney General of Georgia rendered an opinion in favor of the doubtful procedures only after a citizen of Cedartown, Georgia, had taken the position in a letter to the Governor that the General Assembly had no power to submit for ratification a completely new constitution and that the sole method of so doing was by convention. A legal memorandum discussing the *Wheeler* case in detail accompanied that letter. The opinion of May 28, 1964 from the Attorney General, who represents the appellants in the present case, is merely an argument, not binding on either the appellees or this Court.

[11] See 200 Ga., at 330, 37 S. E. 2d, at 327.

[12] See 200 Ga., at 332, 37 S. E. 2d, at 328.

any private individuals as well as they, had a right to propose a plan of government to the people for their adoption. They were, in fact, a mere assemblage of private citizens, and their work had no more binding sanction than a constitution drafted by Mr. Hamilton, in his office, would have had."

With reference to the Constitutional Convention of 1787 the Supreme Court of Georgia also said, in **Wheeler**, that:[13]

> "It [the convention] had no more express authority to frame and submit to the people a new constitution than did the Georgia Legislature, or the committee provided for by the resolution [the so-called Revision Commission]. . . . That convention simply recognized the right of the people, the sovereign, to adopt a new constitution framed by any one. . . ."

The draft instrument which became the Constitution of 1945 achieved validity only because the people gave it life by ratification in an election. By the time the matter reached the Supreme Court of Georgia it was faced with the question of whether a **constitution** was valid rather than when a **legislative proposal** was valid. In **Wheeler** the court had before it the question not whether the legislature had exceeded its power but whether the people had exceeded their power. In recognizing that distinction the court said:[14]

> ". . . restricting by implication the legislative or any other branch of our government, created by the Constitution; is one thing; and restricting by implication the sovereign right and power of the people is another and altogether different thing."

The court in **Wheeler** simply held that the people had retained to themselves the right to revise their constitu-

[13] See 200 Ga., at 332, 37 S. E. 2d, at 328.

[14] See 200 Ga., at 334, 37 S. E. 2d, at 329.

tion and that since they had ratified the proposed revision by majority vote the new constitution would be treated as valid. The court did not say or imply that the legislature had the power to propose a new constitution but only that the people in the exercise of their sovereignty could adopt a new constitution by direct vote and were not limited under the Constitution of 1877 to acting through a constitutional convention.

It appears then that only a suit brought prior to the time a new constitution is voted on by the people could raise one of the important questions before the District Court in the present case, namely, whether the Georgia General Assembly (malapportioned with disparities as great as 100 to 1) may validly propose a new constitution. Applying its analysis of the reasoning of the Supreme Court of Georgia in **Wheeler** the district court held that the Georgia legislature has no such power.

The district court's decision in the present case is not only in accord with **Wheeler** but is consistent with other authority on similar facts. See, for example, **Livermore v. Waite**, 102 Cal. 113, 36 Pac. 424, 426 (1894), a suit by a taxpayer and citizen to enjoin the Secretary of State of California from submitting to the electors a proposed constitutional "amendment" which was in fact a revision of the constitution. There, the court in affirming the injunction issued by the lower court said:

> "The Legislature is not authorized to assume the function of a constitutional convention and propose for adoption by the people a revision of the entire constitution under the form of an amendment."

In **McFadden v. Jordan**, 32 Cal. 2d 330, 196 Pac. 2d 787 (1948), in which the legislature of California proposed an "amendment" to the California Constitution, suit was brought to prohibit the proposed change from being placed

on the ballot. The court granted the injunction, holding that the proposed change was a "revision" rather than an "amendment" and hence could not be proposed or initiated by the legislature. See also **Carton v. Secretary of State**, 151 Mich. 337, 115 N. W. 429, 430 (1908), and **Ellingham v. Dye**, 178 Ind. 336, 99 N. E. 1, 10 (1912).

If the decision of the district court was not in fact contrary to **Wheeler**, as contended by appellants, they do not question the ancillary jurisdiction of the district court to predicate its injunction in the present case on the absence of authority in the General Assembly to submit a revised constitution to the people in the form of an amendment.[13]

Appellants argue, at page 18 of their jurisdictional statement, that the district court erred in undertaking to resolve a question of state law and in the present circumstances should have abstained. This case, however, arises under the Civil Rights Acts, and abstention would have been clearly inappropriate. See **McNeese v. Board of Education**, 373 U. S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963).

For many reasons the decisions on equitable abstention cited by appellants are not in point in the present case. First, the question whether the Georgia legislature has authority to propose a new constitution to the people in the form of an amendment to the existing Constitution involves no federal constitutional issue as did all of the decisions cited on this point by appellants. Second, no case raising that issue was then pending or is now pending in the state courts, and there would not have been sufficient time before the November general election to bring a new action and obtain a decision from the Supreme Court of Georgia. Third, in **Harrison v. N. A. A.**

[13] *Hurn v. Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933).

C. P., 360 U. S. 167, 79 S. Ct. 1025, 3 L. Ed. 2d 1152 (1959), and **Bell v. Maryland**, ... U. S. ..., 84 S. Ct. 1814 (1964), relied on by appellants, the action taken by this Court had the effect of carefully safeguarding the rights of the affected parties during the period required to obtain a state court adjudication. Fourth, in both **Lucas v. The Forty-Fourth General Assembly of Colorado**, ... U. S. ..., 84 S. Ct. 1472 (1964), and **Swanson v. Illinois**, 226 F. Supp. 699 (D. C. Ill. 1964), there were cases pending in the state court at the time the federal court abstained and, moreover, there is nothing in either of those decisions to indicate that abstention was mandatory.

The whole thrust of **Reynolds v. Sims**, *supra*, under the authority of which the district court framed its order, required the district court to exercise its discretion to apply general equitable principles, and in such circumstances that court could not properly have abstained from deciding the state law question.

III.

The complaint of appellants that the order improperly limits the authority of the 1965 General Assembly is no more than an afterthought and in any event can readily be eliminated by proper application to the district court.

Although appellees do not construe the district court's order at limiting the authority of the 1965 General Assembly, as contended by appellants at pages 18 et ff. of their jurisdictional statement, it was within the authority of the district court to impose such limitations if it had seen fit to do so. See **Thigpen v. Myers**, 33 U. S. Law Week 2060 (USDC W. D. Wash. July 23, 1964) in which the three-judge district court, in giving the Washington legislature the choice of weighted voting or reapportioning itself, said:

> "To the end that redistricting, a political act, may be accomplished in this State by the body primarily constitutionally charged with such responsibility, and to avoid any taint of unconstitutionality, we sanction a special session of the legislature for the sole and limited purpose of enacting redistricting legislation on a constitutional basis, together with the enactment of such legislation as may be necessary to sustain such special session and to carry the plan adopted through the elective process."

In its show cause order of June 19, 1964 the district court invited appellants to advise the court of the effect that the proposed order would have on the functioning of the state government. Appellants made no mention of such alleged restrictions at any time prior to entry of the final revised order of June 30, 1964 and has not applied to the district court for clarification or modification. If appellants should see fit to apply to the district court for modification of the order to eliminate such limitations on the authority of the 1965 General Assembly, appellees will offer no objection to such modification as is necessary to eliminate the restrictions as to which appellants complain in that portion of their jurisdictional statement.

CONCLUSION.

Since the district court, in withholding immediate relief to the appellees in this "unusual case," provided a practical "accommodation" that would not prevent the continued adoption of constitutional amendments on specific matters of importance to the state, it is apparent that the present injunctive order applied general equitable principles adapted to local conditions and carried out both the spirit and letter of this Court's directions in **Reynolds v. Sims.**[18]

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[18] 84 S. Ct., at 1393-4.

It is also apparent that the question of state law decided by the district court in holding that the Georgia General Assembly has no authority to propose to the electorate a new constitution in the form of an amendment was not decided to the contrary by the Supreme Court of Georgia in **Wheeler v. Trustees.**[17]

It therefore appears that the injunctive relief granted by the district court could have been solidly based on either of the foregoing independent grounds and that the charges of appellants that the order places the State of Georgia in a trusteeship are rhetorical rather than realistic.

Nothing has transpired since entry of the final revised order by the district court on June 30, 1964, to change the situation, and appellees respectfully submit that the questions on which the decision under review depends are so unsubstantial as not to need further argument.

Appellees pray, therefore, that the decision below be affirmed.

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[17] 200 Ga. 323, 37 S. E. 2d 322 (1946).

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 300.

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia; A. B. TOLLISON, Ordinary of Forsyth County, Georgia; ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia; and JIM W. DICKERSON, Ordinary of Cherokee County, Georgia,

Appellants,

vs.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN,

Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

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Opinion

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 300.

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia; A. B. TOLLISON, Ordinary of Forsyth County, Georgia; ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia; and JIM W. DICKERSON, Ordinary of Cherokee County, Georgia,
Appellants,

vs.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

BRIEF FOR APPELLANTS.*

I.

OPINIONS BELOW.

The opinion rendered with respect to the decree herein appealed from, is not reported, but was printed as "Appendix A" to the Jurisdictional Statement. The decree

* Due to the expedited nature of this case, this brief is being prepared prior to printing of the record, and hence citation to pages of the record is impossible.

itself was printed as "Appendix B" thereto. The decision of the three-judge district court at an earlier stage of this litigation, involving reapportionment of the State Senate, is reported as **Toombs v. Fortson**, 205 F. Supp. 248 (D. C. Ga. 1962).

II.

JURISDICTION.

The order of the three-judge district court, as finally revised, was entered on June 30, 1964. Notice of Appeal was filed on July 1, 1964, and probable jurisdiction was noted October 8, 1964. Jurisdiction is based on 28 U. S. C. 1253.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Georgia Constitutional and statutory provisions declared unconstitutional below are as follows:

(a) Constitution of Georgia of 1945, Art. III, Sec. III, Par. I (Code, § 2-1501).

(b) Georgia Code, § 47-101, as amended.

Copies of these provisions are attached hereto as "Appendix A."

Provisions of the Georgia Constitutions of 1877 and 1945 governing amendment and revision of the Constitution, also drawn in question in this case, are attached hereto as "Appendix B."

IV.

QUESTIONS PRESENTED.

1. Whether a federal district court in a reapportionment case involving one house of a state legislature, the other house already being on a population basis, has authority to grant relief not only requiring reapportionment of the house found to be defective, but also enjoining, until reapportionment has been completed, submission to the voters for ratification or rejection of a proposed constitution approved by a two-thirds vote of the State legislature?

2. Whether in such a case a federal court also is empowered to grant relief purporting to limit the matters which the legislature may consider pending reapportionment, and to further limit the House of Representatives from functioning except during the regular 45-day session?

3. In enjoining submission to the voters of the new state constitution pending reapportionment, the district court relied in part upon federal grounds involving malapportionment, and in part upon the court's interpretation as to the power of the General Assembly under the State constitution. The question therefore is whether under such circumstances the district court erred in refusing to abstain, and in proceeding to make an independent interpretation of the State constitution, contrary to a previous interpretation by the State's highest court.

V.

STATEMENT OF THE CASE.

On April 4, 1962, four citizens of Georgia, residents of the State's two most populous counties, Fulton and DeKalb, filed complaint against the Secretary of State of Georgia and the ordinaries of six counties in Georgia, the latter being sued as representatives of all ordinaries, attacking the validity under the Fourteenth Amendment of constitutional and statutory provisions governing apportionment of the House of Representatives and State Senate of the Georgia General Assembly.

The apportionment of the House of Representatives, then and now, is prescribed by the State Constitution,[1] which provides that the eight largest counties shall have three representatives each; the thirty counties having the next largest populations, two representatives each; and the remaining 121 counties, one representative each.[2] The Constitution requires that this apportionment be changed within the limits of the prescribed formular following each census,[3] and unlike the situation in **Baker v. Carr**, 369 U. S. 186 (1962), this requirement had always been followed.[4] This 3-2-1 formular of House apportionment had originated in the Constitution of 1868,[5] and was carried forward in the Constitutions of 1877[6] and 1945.

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[1] Art. III, Sec. III, Pars. I and II (Code Ann., §§ 2-1501, 2-1502).

[2] Georgia has a total of 159 counties. See Constitution, Art. XI, Sec. I, Par. II (Code Ann., § 2-7802); Code Ann., § 23-101.

[3] Art. III, Sec. III, Par. II (Code Ann., § 2-1502).

[4] See, e. g., Ga. Laws 1941, p. 348; Ga. Laws 1951, p. 26; Ga. Laws 1961, p. 111.

[5] McElreath, A Treatise on the Constitution of Georgia, § 703 (1912); hereinafter cited as "McElreath".

[6] McElreath, § 864.

With respect to the Senate, at the time of filing of the complaint in 1962, the Constitution merely provided that there should be not more than fifty-four senatorial districts with one senator from each district,[7] and the actual apportionment was defined by statute,[8] which arranged the counties in districts of three counties each with but two exceptions: Fulton, the State's largest county, constituted one district, and Chatham, the second largest county at the time of passage of the then current apportionment statute, was combined with Effingham to constitute a two-county district. This apportionment of the State Senate on a basis of three-county groupings originated with the Constitution of 1861,[9] and was carried forward substantially in all subsequent constitutions.[10] The representation in both Houses of the General Assembly was therefore primarily predicated on a political unit basis with some recognition given to population in the House,[11] and to a lesser extent in the Senate.

Also in effect for a number of years were statutes prescribing a "rotation plan" for senators, whereby the nomination of candidates would be rotated among the counties in each district, so that in all districts, other than Fulton, nomination of the senator be rotated among the counties comprising the district each term.[12]

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[7] Constitution of 1945, Art. III, Sec. II, Par. I (Code Ann., § 2-1401).

[8] Code Ann., § 47-102.

[9] McElreath, § 475.

[10] McElreath, §§ 576, 699; 862a.

[11] A more complete history of the apportionment of legislative power in Georgia is set forth in the opinion of the District Court in the county-unit case, *Sanders v. Gray*, 203 F. Supp. 158 (D. C. Ga. 1962).

[12] Ga. Laws 1946, p. 42, as amended; Ga. Laws 1950, p. 165; Ga. Laws 1939, p. 311.

Following filing of the complaint, a three-judge court was convened, and after hearing, rendered its decision on May 25, 1962, declaring that ". . . [W]e determine and hold that so long as the Legislature of the State of Georgia does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements." With respect to relief, the Court declared, "We have concluded that we should postpone any further proceedings in this matter until the State has had a reasonable opportunity to meet the constitutional standards here laid down prior to the January, 1963, session." **Toombs v. Fortson,** 205 F. Supp. 248, 257, 259 (D. C. Ga. 1962).

Several subsequent clarifying opinions were rendered, but none of them had the effect of changing the Court's original order. However, pertinent to one of the arguments presented here, in a clarifying order of July 13, 1962, a majority of the Court concluded:

> "Neither did we hold that the General Assembly would not have legal status or existence if the apportionment standard set by us is not met by the January, 1963, deadline. We have not reached that point. It would be a drastic intrusion into the affairs of the State—the most drastic of the remedies available to the Court. Its present status will continue until changed."

Judge Tuttle, on the other hand, dissented on this point, declaring that "unless the constitutional defects are remedied by the time the new Legislature takes office in January, Georgia will have no legally constituted Legislature".

In another clarifying order rendered September 5, 1962, a majority of the Court, in reviewing several proposals then under consideration by a state legislative committee,

held that so long as one house of the State Legislature was apportioned according to population, the other house might be based upon geography or other considerations, "so long as [its] composition . . . is not so unrepresentative as to cause the entire Legislature to depart from the pattern set by the United States Congress".

Under the Constitution and laws of Georgia, members of the House and Senate were to be elected for two-year terms in the 1962 November General Election, and notwithstanding that the General Assembly had just completed one extraordinary session in April, an unprecedented second extraordinary session was called by the Governor which convened on September 27, 1962, to consider measures reapportioning one house in accordance with the Court's opinion.[13]

The General Assembly convened in extraordinary session as scheduled and enacted legislation and proposed a constitutional amendment, providing for reapportionment of the State Senate on the basis of 54 single member senatorial districts comprising substantially equal numbers of people (Ga. Laws 1962, 2nd Ex. Sess., pp. 7, 51).[14] The constitutional amendment was ratified by the people in the 1962 November General Election, and also at said election, senators were elected in accordance with the new reapportionment legislation to take office in January, 1963. Litigation involving the validity of so much of this legislation as required county-wide voting for senators in multi-district counties is now before this court in an appeal entitled **Fortson v. Dorsey**, No. 178, October Term 1964.[15] Other than

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[13] Ga. Laws 1962, 2nd Ex. Sess., p. 3.

[14] As pointed out in the brief for the United States in *Gray v. Sanders*, 372 U. S. 368 (1963), under the 1963 Senate Apportionment Act, the nine most populous counties having 43% of the State's population elect 43% of the Senators.

[15] For the decisions below, see *Dorsey v. Fortson*, 228 F. Supp. 259 (D. C. Ga. 1964).

as involved in the case last mentioned, the validity of the 1962 reapportionment legislation is not in question, the court below as well as plaintiffs herein having recognized that said legislation effectuated a valid reapportionment of the Georgia Senate on a population basis in accordance with federal constitutional standards. The State of Georgia thereby fulfilled its constitutional responsibility within the same year of the court's decision, without the necessity of a single injunctive order having been issued.

On June 17, 1964, two days after rendition of this Court's decision in **Reynolds v. Sims**, 377 U. S. 533 (1964), plaintiffs below filed motion for further relief, seeking to compel reapportionment of the House of Representatives of the General Assembly of Georgia.

At the hearing on this motion, held on June 19, 1964, counsel for plaintiffs stated at the outset that there were but two questions before the Court, viz:

> "That then leaves us only two questions: Who should do the job? and when?"[16]

The first intimation that issues other than those asserted by plaintiffs might be at stake came from an observation by Chief Judge Tuttle, who expressed concern that during any interim period pending reapportionment, the State was "continuing to legislate on some of the most basic problems of our State, including the passage . . . of a new election law . . . and also . . . the consideration of a new constitution . . ." (Tr. 17). On several other instances during argument, Judge Tuttle raised this same issue again (Tr. 43; 72; 92; 94), but was reassured by counsel for plaintiffs that such relief was "beyond the scope of our petition . . ." (Tr. 43; 94).

When counsel for defendants sought to respond to this proposition, he was stopped by another of the Judges, who declared:

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[16] Tr. 20.

"Judge Bell: Mr. Leverett, the best answer you have to Judge Morgan and Judge Tuttle, it seems to me, is Mr. Shackleford just stated in open court this was beyond the scope of his petition . . ." (Tr. 65).

However, another aspect of the order which finally emerged was injected by Judge Bell himself, who raised the possibility that the Court might grant a delay, but enjoin the 1965 Legislature from taking any action at the 1965 Session other than reapportioning the House (Tr. 69).

Following these arguments on June 19, the Court rendered an opinion and proposed order.

In its opinion, the Court declared that, "It is thus plain to all that the present Legislature is constituted in such a manner as to violate the Constitutional rights of the plaintiffs and the class which they represent."

With respect to relief, the Court noted that the General Assembly was at that time convened in special session considering the enactment of an election code, and the proposing of a new state constitution.[17]

With respect to the election code, the court observed that it could be changed by a subsequently reapportioned legislature merely by majority vote. With respect to the proposed constitution, however, the Court noted that it could be amended later only by a two-thirds vote of both houses, and ratification by the people. Also in this con-

[17] This extraordinary session had been called by the Governor, primarily for the purpose of considering a new state constitution, without regard to any considerations of apportionment, but simply in response to widespread demand from all areas of the state, predicated upon the statutory detail of the 1945 Constitution which had made necessary over 380 amendments within less than 20 years. Constitutional revision had been one program announced by Governor Sanders in his state-of-the-state address following his inauguration in 1963. Consideration of the election code *at this same session* was merely an afterthought, suggested by the fact that while one house was considering the Constitution, the other house could be devoting its time to the election code.

nection, the Court expressed doubt as to the validity of the pending constitutional revision procedure under the state constitution. In this respect, the Court had reference to a contention currently being made in the public press to the effect that because the Georgia Constitution made provision for specific, individual amendments by two-thirds vote of both houses and ratification by the people,[18] whereas in another provision dealing with conventions of the people, reference is made to "revising the Constitution,"[19] the necessary inference is that the preparation of an **entirely new constitution** can be submitted only by a convention, which admittedly had not been the case as to the pending Constitution.[20]

On the basis of these considerations—federal law considerations as to malapportionment, and state law considerations as to the legality of the proposed procedure—the court concluded:

> "Thus, while we feel it appropriate in the exercise of the judicial function to permit the General As-

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[18] Constitution of Georgia, Art. XIII, Sec. I, Par. I.

[19] Id., Par. II.

[20] The proposed new Constitution was originally drafted by a "Constitution Revision Commission" created by law, the members of which were appointed by the Governor. See Ga. Laws 1963, p. 402. This draft was then submitted to the General Assembly where it received a vote of two-thirds of the members of both houses, including the population-based senate. The proposal was then to have been submitted to the people for ratification or rejection in the November 1964 general election. The identical procedure was employed in connection with the adoption of the 1945 Constitution under the 1877 Constitution which was for all purposes here identical to the 1945 Constitution as regards amendment procedures. See "Appendix B." In *Wheeler v. Trustees of Fargo School District*, 200 Ga. 323, 37 S. E. 322 (1946), the Supreme Court of Georgia upheld the submission procedures utilized with respect to the 1945 Constitution and now being invoked with respect to the pending constitution, on the reasoning that the provision of the Constitution relating to conventions was not exclusive, but a limitation only if the convention procedure were followed.

sembly to reapportion itself, since the guidelines now established by the Supreme Court are plain and simple, we do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as is the case here, proposed under conditions of doubtful legality by a malapportioned legislative body".

The Court then set forth a proposed order which, in addition to declaring unconstitutional the state constitutional and statutory provisions governing apportionment of the House of Representatives, also would (1) Enjoin submission of the proposed new state Constitution, and (2) Limit the authority of the 1965 General Assembly, pending reapportionment, (a) to specified "legislation", and (b) to functioning during the regular 45-day session.

Appellants filed response in opposition to this proposed order, but after hearing, the Court issued the order in substantially the same form as previously indicated, on June 24, 1964. The order was later revised on July 30.

Application for stay was denied below, and by Mr. Justice Black of this Court on July 6, 1964.

The effect has been that the proposed state constitution, the principal product of a special session costing in excess of one million dollars, will not be submitted to the voters in the 1964 General Election.

Also pertinent to the proceedings here, on October 7, 1964, appellants here filed "Motion for Modification of Order" with the District Court below, seeking modification of the district court's order here appealed from, so as (1) To permit the General Assembly elected in 1964 to serve a full, two-year term, rather than requiring reapportionment in the middle of the term, and (2) On the alternative, to

modify the order so as to remove the limitations placed upon the 1965 General Assembly as to the time during 1965 in which it may function, and the subject matters which it may consider. Assuming that the district court may properly entertain this motion,[21] at the time this brief is written, no hearing has been set upon the motion.

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[21] For a holding to the contrary, see *Schempp v. School District of Abington Township*, 184 F. Supp. 381 (D. C. Pa. 1959). In the present case, however, the district court expressly retained jurisdiction "for such other and further orders as may be necessary".

VI.

ARGUMENT.

1. The District Court Erred in Enjoining Submission of the Proposed State Constitution.

The issue here concerns the appropriateness of relief beyond the compelling of reapportionment itself. Essentially, the question is whether a federal court, having decreed reapportionment of one house of a state legislature, the other house being already on a population basis, acts properly and within its authority in seeking to delimit the law-making process during the interim period pending reapportionment. Moreover, since the order in question here relied not only upon federal considerations of malapportionment in enjoining submission of the state constitution, but also predicated its decision in part upon an independent interpretation of the Legislature's power under the existing state constitution, the collateral question is also presented as to whether the federal court erred in declining to abstain pending determination of the state law question by the state courts.

Before considering these questions, however, it is necessary that the issue of mootness be dealt with.

By the time this case is argued on November 18, the 1964 General Election will have passed, and, of course, the proposed state constitution[1] will not have been voted upon. Under the existing state constitution,[2] as well as under the submitting clause of the proposed constitution,[3] the proposed constitution as submitted by the 1964 General Assembly could have been voted on only in the 1964 General Election. However, the order complained of purports to

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[1] Ga. Laws 1964 Ex. Sess., p. 234.

[2] Art. XIII, Sec. I, Par. I (Code Ann., § 2-8101).

[3] Ga. Laws 1964 Ex. Sess., pp. 234, 333.

enjoin its submission not only at the 1964 election, but also "at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards . . ." Since constitutional revision is one of the Governor's major programs, it is quite likely that he may wish to present the proposed revision to the 1965 General Assembly for resubmission to the voters at the 1966 General Election. Nor is it any answer to say that this presentation could be made to the 1966 General Assembly, which presumably under the court's order below will have been reapportioned by that time, for there are other, unrelated reasons why presentation to the 1966 General Assembly is not desirable. In this respect, reference is made to the fact that 1966 is a "political year" in Georgia, in that not only will a new legislature be elected, but also a governor and a vast majority of all other state officers. Under such circumstances, a Legislature is not capable of promulgating any meaningful constitutional reform. Consequently, it is quite apparent that the issue as to the proposed constitution is not moot. cf. **Gray v. Sanders**, 372 U. S. 368, 375 (1963); **Leonard v. Earle**, 279 U. S. 392, 398 (1929); **J. I. Case Co. v. N. L. R. B.**, 321 U. S. 332, 334 (1944).

(a) **Enjoining Submission of the State Constitution on Federal Grounds.**

In addition to the considerations of state law, hereinafter referred to, the Court predicated this feature of its order on the reasoning that the ill-effects of a malapportioned legislature would be frozen into the Constitution which would, because of the two-thirds vote of both houses required by the Constitution, be difficult to eliminate in the future. But if this be the case, are not the people themselves just as capable of reaching this same conclusion and resolving the issue at the ballot box in November by the very means which the Court below has denied them? Have democratic processes become

so destitute in this country that people can no longer be trusted with important policy decisions, but must have them resolved by the judicial bench? The simple fact of the matter is that policies should be set by legislative bodies, albeit malapportioned ones, for of all institutions, courts are the least representative. See **Carpenter**, 9 Vill. L. R. 415, 420 (1964). And, as recently stated, "In the long run, judge-made policy may well prove to be the more arbitrary, less-generous, and more chilling than what emerges from the political market place." **Lancaster**, 15 Vand. L. R. 1247, 1248-9 (1962).

Aside from this, the Court resolved this issue on an assumption that was neither plead at the outset, supported by evidence, nor supplied by judicial notice. There was nothing whatever before the Court which would justify a finding that the proposed Constitution had been "loaded" by a rural-dominated legislature in such a manner as to induce acceptance of undesirable features in order to gain desirable ones. A finding which is not based on evidence denies due processes. **Thompson v. City of Louisville**, 362 U. S. 199 (1960). Nor can judicial notice be taken of matters not called to the attention of the parties, for to do so would be "to turn the doctrine into a pretext of dispensing with a trial." **Garner v. Louisiana**, 368 U. S. 157 (1961).

But beyond these considerations, the more basic question here is the power of the federal court, in effect, to assume a trusteeship over the internal workings of state government, hardly less drastic in nature than placing the state in a receivership.

At the outset, it is undisputed that legislation enacted by a malapportioned legislature is valid notwithstanding such unconstitutional apportionment, **Cedar Rapids v. Cox**, 252 Iowa 948, 964, 108 N. W. 2d 253, 262 (1961); **State v. Latham**, 190 Kan. 411, 375 P. 2d 788, 799 (1962);

Ryan v. Tinsley, 316 F. 2d 430 (C. A. 10th 1963), cert. den. 375 U. S. 17 (1963); **United States ex rel. Watkins v. Pennsylvania**, 214 F. Supp. 913 (D. C. Pa. 1963); **Barnes v. Ladner**, 241 Miss. 606, 131 So. 2d 458 (1961); **People v. Clardy**, 334 Ill. 160, 165 N. E. 638 (1929); **Dixie Fireworks Co., Inc. v. McArthur**, 218 Ga. 735, 130 S. E. 2d 731 (1963); **Scholle v. Hare**, 367 Mich. 176, 116 N. W. 2d 350, 356 (1962); **Opinion to the Governor**, 185 A. 2d 111 (1962); **Lindsay v. State**, 41 Ala. App. 496, 139 So. 2d 353 (1962); **Baker v. Carr**, 206 F. Supp. 341, 350 (D. C. Tenn. 1962); and see Katzenbach, "Some Reflections Upon Baker v. Carr", 15 Vand. L. R. 829, 835 (1962), where it was said: "In each case, the remedy is directed at future elections and does not impeach the validity or ability to act, of the incumbent legislature."

In his concurring opinion in **Baker v. Carr**, Mr. Justice Douglas noted: "The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act (**Cedar Rapids v. Cox**, 252 Iowa 948, 964, 108 N. W. 2d 253, 262, 263; cf. **Kidd v. McCanless**, 200 Tenn. 273, 292 S. W. 2d 40) is plainly correct."

Therefore, if legislation enacted by a malapportioned legislature is not thereby rendered invalid, upon what basis can the law be invalidated even before passage? In the present context, the case is an even stronger one, because of the rule that in no event do courts intervene, regardless of the supposed invalidity of the pending law, until the enactment is complete.

In **Gaskins v. Dorsey**, 150 Ga. 638, 104 S. E. 433 (1920), it was said:

> "The judicial power will not be exerted to stay the course of legislation while it is in process of enactment; and this principle is applicable both to

ordinary legislation and to the analogous course of an amendment to the constitution from the time of the introduction of the act proposing the amendment until the electors have acted."

See also, in accord, **Clayton v. Calhoun**, 76 Ga. 270 (1885); **Clements v. Roberts**, 230 S. W. 30, 144 Tenn. 129, reh. den. 231 S. W. 902; 144 Tenn. 152; **11 Am. Jur. 902**, Sec. 200; **16 C. J. S. 724**, Sec. 151 (1). The only exception is when the election itself would be illegal, in which case a taxpayer has standing to challenge the expenditure of public funds for holding an illegal election. See **Tolbert v. Long**, 134 Ga. 292, 67 S. E. 826 (1910), distinguished in the Gaskins case, supra.

As stated by this Court, "Litigation cannot arise until the moment of legislation is past." **Prentis v. Atlantic Coast Line Co.**, 211 U. S. 210, 228 (1908). The Court's function is "the more limited one of interpreting the law as it now stands," **Sinclair Refining Co. v. Atkinson**, 370 U. S. 195, 215 (1962), and "The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order or ordinance." **McChord v. L. & N. Railroad Co.**, 183 U. S. 483, 496 (1902), and see **Drew v. Scranton**, 229 F. Supp. 308 (D. C. Pa. 1963).

In answer to these principles, the novel argument is presented by plaintiffs to the effect that because the court below concededly could have ordered reapportionment of the House prior to the 1964 elections, by declining to do so and granting a delay, the court in some unexplainable fashion acquired powers otherwise lacking, an order to provide "accommodation" by prescribing the "performance of conditions designed to protect the rights of the parties pending appeal . . . or to protect temporarily the public interest while its decree is being carried into effect" (Motion to Affirm, p. 8). The first difficulty with this proposition is that it generally is applied only to a **plaintiff**

seeking relief on the reasoning that "he who seeks equity must do equity", **Central Kentucky Natural Gas Co. v. Railroad Commission**, 290 U. S. 264, 271 (1933), is a power which "should be cautiously exercised" (Id., 290 U. S. at 272) and is subject to limitations "inherent in the nature of the jurisdiction" exercised by the court, which may not usurp the legislative function itself (290 U. S. at 271). It is significant to note that the **Kentucky Natural Gas Company case**, supra, relied upon by plaintiff, involved a holding by this court that a requirement imposed by the district court as a condition of the grant of relief prayed by plaintiff, was invalid as an attempt by the court to invade the province of the state legislative body in the prescribing of utility rates. It was said:

> "The practical effect of a denial of relief unless the plaintiff will submit to a rate, the reasonableness of which he challenges, is to make the surrender of the right to invoke a distinctively state legislative function the price of justice in the federal courts. The practice would tend to curtail the exercise of that function by action of a court which is itself without authority either to exercise it or to prevent the state from doing so. Such interference with the legislative function is not a proper exercise of the discretionary powers of a federal court of equity."

Moreover, if the doctrine asserted here is to be applied prospectively, what is to prevent it from being manipulated so as to achieve a retroactive effect? For example, could the court here have conditioned the delay in reapportionment upon the interim legislature's complying with a court-directed mandate to repeal all existing legislation deemed by the court to reflect built-in-biases of the existing system found to be malapportioned? More concretely, the issue is drawn into sharp focus here because of the fact that the existing 1945 Constitution was submitted by a legislature which overall was much more

malapportioned than the legislature which submitted the pending document. The 1964 Senate had been reapportioned on a population basis, under which residents of the nine most populous counties comprising 43% of the population elected 43% of the senators, whereas the 1945 Senate was elected under the apportionment statutes condemned in 1962,[3] and under which less than 10% of the people could elect a majority of the Senate.

In this connection, it is also interesting to note that the pending constitution contains new and far-reaching powers relating to home rule,[4] rapid transit,[5] public parking systems,[6] and county-furnishing of municipal-type services[7]—matters all of peculiar interest to urban areas. Yet the effect of the decision below is effectively to preclude the acquisition of this much-needed authority by the great metropolitan centers for another four years. Nor is it any answer to say that these goals can still be achieved by submission of individual amendments separate as to subject matter (Constitution of 1945, Art. XIII), for the experience of the 1964 General Assembly discloses that, for example, in writing into the new constitution the new powers relating to rapid transit, substantial alterations were required in several articles, such as those relating to taxation, public debt, and eminent domain, yet the legality of piece-meal amendments touching several articles is questionable under the existing constitution.

In **League of Nebraska Municipalities v. Marsh**, 209 F. Supp. 189, 194 (D. C. Neb. 1962), the district court refused to enjoin submission of a proposed constitutional amendment reapportioning the Legislature, based upon plaintiffs' contention that the amendment itself was un-

[4] Art. 7, Ga. Laws 1964 Ex. Sess., pp. 234, 315 et seq.

[5] Art. 5, Sec. 4, Par. 2, Ga. Laws 1964 Ex. Sess., pp. 234, 304.

[6] Id.

[7] Art. 7, Sec. 1, Ga. Laws 1964 Ex. Sess., pp. 234, 315.

constitutional, the court declining to consider the validity of the amendment in advance of its submission.

And, in **Lucas v. Colorado General Assembly,** 377 U. S. 713 (1964), this court approved the action of the district court below in permitting submission of a Constitutional amendment proposed by a malapportioned legislature.

In **Reynolds v. Sims,** 377 U. S. 533 (1964), where the district court had expressed an opinion that a proposed constitutional amendment was void for failing to meet federal requirements, the district court nevertheless did not enjoin its submission to the voters. See 208 F. Supp. 431. There is another obvious difference. There the Court expressed an opinion only with respect to a single measure designed as a compliance with the Court's opinion. Here, the Court has gone outside the confines of the pending litigation to adjudicate with respect to an entirely new constitution, the apportionment provisions of which undisputedly are valid under equal protection requirements.[8]

In all six of the state reapportionment cases decided by this Court on June 15, 1964, it was expressly recognized that there would be an interim period during which a legislature determined to be malapportioned nevertheless would be permitted to continue. In **Maryland Committee v. Tawes,** 377 U. S. 656, 675 (1964), this court of its own volition approved a two-year delay in reapportionment, and in the Virginia case, **Davis v. Mann,** 377 U. S. 678, 692 (1964), a delay of approximately 1½ years was approved. Yet in none of these cases was it suggested that during this interim period, the legislatures thus constituted would be without plenary legislative power.

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[8] Article 2, Sec. 3, Par. 1 of the proposed Constitution provides that, "The House of Representatives shall consist of not less than one hundred sixty-two nor more than two hundred sixteen members and the apportionment thereof shall be as provided by the General Assembly" (Ga. Laws 1964 Ex. Sess., pp. 234, 244).

A contrary doctrine would enable a court to exercise a veto power over all state legislation, approving only that which meets the economic or political philosophy of the prevailing judicial order. Courts are not equipped to exercise such value judgments. The federal judiciary is not comprised of philosopher-kings. The danger of their undertaking to make policy-choices was forcibly stated 50 years ago in Mr. Justice Holmes' dissent in **Lochner v. New York**, 198 U. S. 45, 75 (1905).

State cases relied upon by plaintiffs, such as **McFadden v. Jordan**, 32 Cal. 2d 330, 196 P. 2d 787, 796 (1948), and **Livermore v. Waite**, 102 Cal. 113, 36 Pac. 424 (1894), are inapposite insofar as federal constitutional aspects are concerned, as those cases involved not apportionment, but failure of a state legislature to follow state procedural requirements in the manner of submission.

(b) **Reliance on State Law Considerations.**

In enjoining submission of the proposed revised constitution, the district court below relied not only upon the alleged effects of submission by a malapportioned legislature, but also upon the court's independent interpretation of state constitutional provisions governing amendment procedures to the effect that a completely new constitution could be submitted only by a constitutional convention. See Constitution, Art. XIII (Appendix B).

It is impossible to determine whether the Court would have reached the result it did absent the supposed state grounds. It therefore becomes pertinent to discover whether the district court erred in its determination of the state question, for if so, it is entirely possible that it would not have felt federal considerations alone compelling enough to justify the drastic remedy administered.

To begin with, it goes without saying that federal courts are bound by the decision of the state courts as to the

meaning and interpretation of a state constitutional provision. **American Federation of Labor v. Watson,** 327 U. S. 582, 596 (1946); **Louisiana ex rel. Francis v. Resweber,** 329 U. S. 459 (1947). So being, it is too clear to admit of argument that the identical question of state law decided by the federal court below was decided in a manner completely contrary to that of the Georgia Supreme Court. As shown in Appendix B, the provisions of the 1877 Constitution governing amendment procedures, under which the 1945 Constitution was adopted, were for all relevant purposes identical to those of the 1945 Constitution, under which the proposed constitution was being submitted. Secondly, it is likewise clear that the identical procedure of submission, drafting by a statutory constitutional commission, passage by two-thirds of both houses, and ratification by the people, was being employed. Compare Ga. Laws 1963, Vol. I, p. 402; Ga. Laws 1964, Ex. Sess., p. 234, with Ga. Laws 1943, p. 1680; Ga. Laws 1945, p. 8.

Following adoption of the 1945 Constitution, it was attacked on the identical ground asserted here, i. e., that under the existing State constitutional provisions governing amendment procedures, a completely new constitution as distinguished from individual amendments, could be submitted only by a constitutional convention. The Supreme Court of Georgia rejected this contention, holding that the provisions of the Constitution of 1877 governing constitutional conventions could not be construed as the exclusive means of overall constitutional revision. Concerning the state constitutional provision governing conventions, it was said:

> "The section purports to do nothing more than to place limitations upon the legislative branch of the government as to the manner in which a convention can be called by this branch of the government" (200 Ga at 331).

As pointed out in Saye, "Constitutional Development in Georgia Since 1945", 13 Ga. B. J. 275 (1951), not only was the federal constitution adopted by a procedure not in accord with the resolution of Congress which referred only to amending the Articles of Confederation, but also, the Georgia Convention of 1788 was called in disregard of the procedure prescribed in the Constitution of 1777.

Moreover, the identical question had already been resolved earlier this year by an opinion of the Attorney General of Georgia.

In response to a request from the Governor, the Attorney General had, on May 28, 1964, rendered an opinion upholding the procedure being followed, in which it was concluded:

> "Moreover, the language of the Supreme Court quoted above and the reasoning there employed is such as to make it clear that the same rule applies regardless of whether the question is raised before or after the proposal is ratified by the people, for the basis of the Court's opinion is not some far-fetched notion of estoppel, but rather the proposition that the provisions of the existing Constitution governing conventions do not operate as an implied exclusion of all other means, but merely as a limitation upon the convention procedure should it be invoked."
>
> • • • • • • • •
>
> "There is another reason, however, why the same rule applies regardless of whether the challenge is made before or after the ratification. If the procedure of submission is illegal, the fact that a proposal is ratified by the people does not cure the illegal submission. **Seago v. Richmond County**, 218 Ga. 151; **Higer v. Hanson**, 67 Idaho 45, 170 P. 2d 411 (1946); **Stovall v. Gartrell**, ... Ky. ..., 332 S. W. 2d 256 (1960). Consequently, if the contention urged here be valid, a different result would have been compelled in the **Fargo** case, supra.

> Secondly, the argument urged against the present procedure completely overlooks the most basic and fundamental of all principles of constitutional law: a state constitution is not a delegation or grant or power, but is only a limitation of power. **11 Am. Jur 619**, Sec. 18; **16 C. J. S. 189**, Sec. 70; Cooley, **Constitution Limitations**, p. 126 (7th Ed.); **Tripp v. Martin**, 210 Ga. 284, and cf. Constitution, Art. III, Sec. VII, Par. XX (Code, Sec. 2-1920). So construed, Art. XII, Sec. I, Par. II, is merely a limitation upon the convention procedure, and does not elevate it to the status of an **exclusive method.**"

Obviously, an opinion of the Attorney General is not conclusive on the courts, but rendered as this one was outside the context of any pending litigation, it is certainly entitled to respect. **Georgia Association of Osteopathic Physicians v. Allen**, 112 F. 2d 52, 54 (C. C. A. 5th 1940).

Defendants submit that, fairly construed, the **Wheeler** decision can mean but one thing, and that is that the constitutional convention method is not the exclusive method of complete constitutional revision, whether raised before or after the ratification by the people. The Supreme Court expressly recognized that, even in the context of a challenge after ratification, the ratification must be in accord with existing legal machinery (200 Ga. at 334), yet what was done there was upheld.

Aside from the fact that the district court below was bound to follow the Wheeler case, even assuming that it considered the issue doubtful,[9] it is submitted that it should have abstained pending an authoritative determination by the state court.

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[9] In its opinion below, the court declared: ". . . We do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as in the case here, proposed under conditions of doubtful legality . . ."

Ever since the landmark decision in **Railroad Commission v. Pullman Company**, 312 U. S. 496 (1941), it has been well settled that as one manifestation of the principle that equitable jurisdiction is discretionary, the federal courts generally will abstain pending determination of proceedings to be brought in state court which may have the effect of obviating the necessity for federal adjudication. See also **Leiter Minerals, Inc. v. United States**, 352 U. S. 220 (1956); **Louisiana Power & Light Co. v. Thibodaux**, 360 U. S. 25 (1959); **Spector Motor Service, Inc. v. McLaughlin**, 323 U. S. 101, 105 (1944). Of course, the present case differs somewhat from the usual abstention-type situation, when the ultimate resolution of federal questions may be avoided by possible state court interpretation of state laws. Here the resolution of the state question would not remove the federal questions, but in view of the district court's reliance on the combined effect of both state and federal grounds, abstention has "drawn upon the judicial discretion of the chancellor to decline jurisdiction over a part or all of a case brought before him." **Louisiana Power and Light Co. v. Thibodaux**, 360 U. S. 25; 28 (1959).

The doctrine applies to civil rights cases with a racial context, **Harrison v. N. A. A. C. P.**, 360 U. S. 167 (1959), as well as to those involving apportionment. **Lucas v. The Forty-Fourth General Assembly of Colorado**, 377 U. S. 713 (1964), footnote 2; **Swanson v. Illinois**, 226 F. Supp. 699 (D. C. Ill. 1964). And, as more recently declared by this Court,

> "It is not for us, however, to decide this question of Maryland law, or to reach a conclusion as to how the Maryland Court of Appeals would decide it. Such a course would be inconsistent with our tradition of deference to state courts on questions of state law." **Bell v. Maryland**, 378 U. S. 226 (1964).

McNeese v. Board of Education, 373 U. S. 668 (1963), relied upon by plaintiffs, is obviously distinguishable, for there the court held that an **administrative remedy** need not be exhausted where it was seen that the remedy was not adequate. Secondly, the fact that proceedings were not already pending in state courts is immaterial, for such was also the case in **Railroad Commission v. Pullman Company**, 312 U. S. 496 (1941). In this connection, plaintiffs are in error in asserting that sufficient time did not remain for institution of necessary state court proceedings. Hearing on an application for temporary injunction could be set upon three or four days notice, Ga. Code Ann., § 55-201. The decision granting or denying a temporary injunction is subject to review by the Supreme Court of Georgia even though an answer has not been filed. Ga. Code Ann., § 6-903.

It is thus apparent that there was ample time for institution of state court proceedings and docketing of an appeal in the Supreme Court of Georgia for its September Term which began September 7, 1964. Ga. Code Ann., § 24-3801.

2. The Order Purporting to Limit the Authority of the 1965 General Assembly.

This injunctive order, granted without any pleadings or evidence whatever to support it, and without a single member of the General Assembly being made a party of record, in effect undertakes to tell the 1965 General Assembly what it can consider, and how long it can function, stated to be:

> ". . . [T]he enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements

and as may be necessary to permit the holding of elections to the newly constituted General Assembly. . . ."

It is difficult if not impossible to determine fully the extent of this order, and its scope can not be fully appreciated except as specific problems may arise in the future. Since, strictly speaking the proposing of constitutional amendments is not "legislation," **11 Am. Jur. 632**, § 28, it seems doubtful that the 1965 General Assembly could propose constitutional amendments, unless paragraph 2 of the order be construed as so authorizing.

In addition to the enactment of legislation, the General Assembly otherwise has authority to vote bills of impeachment,[10] conduct investigations, election contests,[11] elect and remove a state auditor,[12] and grant pardons or other relief for persons convicted of treason.[13] Yet if the injunctive order here complained of be valid, none of these functions can be performed.

Plaintiffs assert, however, that the district court's order was not intended to have the effect claimed by defendants. But as shown in the various statements made by members of the court below on the June 19th hearing, it is clear beyond cavil that the court below intended for it to have exactly that effect, and the only reason why the 1965 General Assembly was not limited solely to reapportionment legislation was recognition of the fact that the Georgia Constitution[14] requires that a new appropriations act

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[10] Constitution of Georgia, Art. III, Sec. VI, Par. III (Code Ann., § 2-1803).

[11] Id., Sec. VII, Par. I; and see Beatty v. Myrick, 218 Ga. 629, 129 S. E. 2d 764 (1963).

[12] Ga. Code Ann., § 40-1801.

[13] Constitution of Georgia, Art. V, Sec. I, Par. XI (Code Ann. § 2-3011).

[14] Constitution, Art. VII, Sec. IX, as amended (Code Ann., § 2-6202).

be enacted in 1965 (Tr. 70, 85). Moreover, the fact that plaintiffs are willing to agree to modification of the order in this regard (Motion to Affirm, p. 20) is unavailing, for not only did they not seek the relief at issue, but expressly disclaimed it in two instances (Tr. 43, 94). As pointed out previously, defendants have recently filed a motion with the district court seeking modification of the order in this respect, but to date a hearing thereon has not been set.

In addition to imposing limitations as to the **subject matters** which the House (and consequently, in most cases, the Senate as well) may consider, the decree also undertakes to limit the **period** during which the House can function. While the decree contemplates that a reapportioned House need not necessarily take office until 1966, thereby requiring special elections in 1965, the plain intendment of the language of the decree is to prohibit the House from functioning at all after the regular 45-day session adjourns in early 1965.[15] This would preclude the convening of any special sessions of the General Assembly should the occasion arise, the appointment or functioning of any interim committees, and would even render illegal the expenditures of state funds to maintain the offices of the Speaker, Floor Leader and other officials. After adjournment of the 45-day session which convenes in January, state government would become paralyzed, and incapable of dealing with any emergency that might require immediate attention.

For the same reasons urged with respect to so much of the order as enjoined submission of the proposed new constitution, it is submitted that this part of the order is similarly erroneous. Both are predicated upon the assumption that because the Court can decree reapportionment, it can likewise supervise all phases of the internal affairs of the legislature pending compliance.

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[15] Constitution of Georgia, Art. III, Sec. IV, Par. III (Code Ann., § 2-1603, Supp.).

This, we submit, is not within the scope of relief contemplated by this Court's decisions of June 15th.

Nor is this any situation as was involved in **Thigpen v. Myers**, 231 F. Supp. 928 (D. C. Wash. 1964), where a recalcitrant legislature had failed to act for a period of two years following decisions of the court (211 F. Supp. 826), and a frustrated federal court felt the need for drastic prodding action. When the court below held that one house was required to be reapportioned, **Toombs v. Fortson**, 205 F. Supp. 248 (D. C. Ga. 1962), it was accomplished within six months (Ga. Laws 1962, 2nd Ex. Sess., pp. 7, 15). When this Court decided on February 17, 1964, that Georgia congressional districts were required to be rearranged, **Wesberry v. Sanders**, 376 U. S. 1 (1964), the necessary legislation was signed into law less than one month later (Ga. Laws 1964, Vol. I, p. 478). In view of such performance, it is hardly charitable to assume in advance that the members of the Georgia General Assembly will so suddenly become errant knaves.

CONCLUSION.

The judgment below should be reversed.

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APPENDIX "A".

Constitutional and Statutory Provisions Governing Apportionment of Members of the House of Representatives of the General Assembly of Georgia.

Georgia Constitution of 1945, Article III, Sec. III:

Paragraph I.—**Number of representatives.**—The House of Representatives shall consist of representatives apportioned among the several counties of the State as follows: To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each.

Paragraph II.—**Apportionment changed, how.**—The above apportionment shall be changed by the General Assembly at its first session after each census taken by the United States Government in accordance with the provisions of Paragraph I of Section III of this Article.

Georgia Code Ann.:

47-101.—**House of Representatives; membership apportioned.**—The membership of the House of Representatives shall be as follows: Three members each from the counties of Fulton, DeKalb, Chatham, Muscogee, Bibb, Richmond, Cobb, Dougherty; two members each from the counties of Floyd, Hall, Lowndes, Troup, Clayton, Clarke, Walker, Gwinnett, Whitfield, Glynn, Houston, Carroll, Spalding, Thomas, Ware, Baldwin, Colquitt, Laurens, Coweta, Bartow, Coffee, Polk, Decatur, Sumter, Bulloch, Upson, Tift, Cherokee, Catoosa, Newton; and one member each from each of the other counties of the State.

APPENDIX "B".

Constitutional Provisions Governing Amendment and Revision of the State Constitution.

I.

Constitution of 1877, Art. XIII, Sec. I.

Paragraph I.—**Proposal by General Assembly submission to people.** Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon. And the General Assembly shall cause such amendment or amendments to be published in one or more newspapers in each Congressional District, for two months previous to the time of holding the next general election and shall also provide for a submission of such proposed amendment or amendments, to the people at said next general election, and if the people shall ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of this Constitution. When more than one amendment is submitted at the same time they shall be so submitted as to enable the electors to vote on each amendment separately.

Paragraph II.—**Convention, how called.** No Convention of the people shall be called by the General Assembly to revise, amend or change this Constitution, unless by the concurrence of two-thirds of all the members of each House of the General Assembly. The representation in

said convention shall be based on population as near as practicable.

Note: The Georgia Constitution was adopted under the 1877 Constitution by a procedure set forth and held legal in **Wheeler v. Board of Trustees of Fargo Consolidated School District**, 200 Ga. 323, 37 S. E. 2d 322 (1946). The identical procedure is being employed with respect to the proposed new state constitution, enjoined by the district court below.

II.

Constitution of 1945, Art. XIII, Sec. I.

Paragraph I.—**Proposal by General Assembly; submission to people.** Any amendment to this Constitution may be proposed by a resolution in the Senate or the House of Representatives, and if the same shall be agreed to by two-thirds of the members elected to each branch of the General Assembly, such proposed amendment shall be entered on the journals of each branch with the Ayes and Nays taken thereon. Any proposed amendment may be repealed or amended by the same General Assembly, if done so at least two months prior to the date of the election at which such proposed amendment is to be submitted.

The Governer, the Attorney General, and the Secretary of State shall meet and determine whether a proposed amendment is general, and if not general, shall determine what political subdivision or subdivisions are directly affected by such proposed amendment. If a proposed amendment is general, the Governor shall cause such proposed amendment to be published in full once each week for three consecutive weeks immediately preceding the date of the election at which such proposed amendment is submitted, in one newspaper of general circulation in

each Congressional district of the State. If such proposed amendment is not general, the Governor shall cause such proposed amendment to be published in full in one newspaper of general circulation in each county in which the directly affected political subdivision or subdivisions are located. In the event no such newspaper is located in such county, a newspaper in an adjoining county shall be used.

Any proposed amendment which in general shall be submitted to the people of the entire State at the next general election at which members of the General Assembly are elected, and if ratified by a majority of the electors qualified to vote for members of the General Assembly voting thereon, such amendment shall become a part of this Constitution. A proposed amendment which is not general shall only be submitted to the people of the political subdivision or subdivisions directly affected. The votes of the electors in each political subdivision affected shall be counted separately in determining whether such proposed amendment is ratified, and it must be ratified by a majority of the electors qualified to vote for members of the General Assembly voting thereon in each such political subdivision before it shall become a part of this Constitution. The General Assembly, in the resolution, shall state the language to be used in submitting the proposed amendment.

When more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately.

Paragraph II—**Convention, how called.** No convention of the people shall be called by the General Assembly to revise, amend or change this Constitution, unless by the concurrence of two-thirds of all members of each house of the General Assembly. The representation in said convention shall be based on population as near as

practicable. This Constitution shall not be revised, amended, or changed by the Convention until the proposed revision, amendment, or change has been submitted and ratified by the people in the manner provided for submission and ratification of amendments proposed by the General Assembly.

Paragraph III—**Veto not permitted.** The Governor shall not have the right to veto any proposal by the General Assembly to amend the Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 300

BEN W. FORTSON, JR., ET AL., APPELLANTS,

vs.

HENRY J. TOOMBS, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO DISMISS

The appellees respectfully move the Court to dismiss this appeal on the ground that certain facts, which have occurred since the entry of the order in the court below, render this appeal moot.

The appellants seek a determination by this Court of the following questions:

> (1) Whether the district court which had refused to require immediate reapportionment of the Georgia General Assembly, exceeded its equitable powers in enjoining the submission by a malapportioned legislature of an entirely new state constitution for ratification at the November 3, 1964 general election.
>
> (2) Whether the district court exceeded its equitable powers in purporting to restrict the powers of the 1965 General Assembly during the interim prior to reapportionment.

These questions have been rendered moot as the result of events which have transpired since the entry of the order of June 30, 1964, from which this appeal is taken.

By this appeal the appellants sought the right to submit the proposed revision of the Georgia Constitution for ratification by the electorate at the November 3, 1964 general election. It is apparent that any controversy as to the propriety of the injunction which prohibited the placing of the proposed constitution on the November 1964 general election ballot has been rendered moot by that election. *Mills* v. *Green*, 159 U.S. 651, 16 Sup.Ct. 132, 40 L.Ed. 293 (1895). Even if this Court should decide the case in favor of the appellants, it is now powerless to grant them any effective relief. As this Court has aptly said in another context:

> "Obviously no decision we could render now would protect any rights [they] may once have had, and this Court does not sit to decide arguments after events have put them to rest." *Doremus* v. *Board of Education*, 342 U.S. 429, 432-33, 72 Sup. Ct. 394, 96 L.Ed. 475 (1952).

In *Mills* v. *Green*, 159 U.S. 651, 16 Sup.Ct. 132, 40 L.Ed. 293 (1895), this Court emphasized its inability to grant effective relief after an election as requiring a dismissal of an action to enjoin South Carolina election officials from illegally refusing to permit a qualified voter from participating in a particular election. Said the Court:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect,

and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal . . .

". . . .

"In the case at bar, the whole object of the bill was to secure a right to vote at the election, to be held, as the bill alleged on the third Tuesday of August, 1895, of delegates to the constitutional convention of South Carolina. Before this appeal was taken by the plaintiff from the decree of the circuit court of appeals dismissing this bill, that date had passed, and before the entry of the appeal in this court, the convention had assembled . . .

"It is obvious, therefore, that, even if the bill could properly be held to present a case within the jurisdiction of the circuit court, no relief within the scope of the bill could now be granted."

Similarly, in *Blackman* v. *Stone*, 17 F.Supp. 102 (S.D. Ill. 1936), judgment vacated 300 U.S. 641, 57 Sup.Ct. 514, 81 L.Ed. 856 (1937) this Court likewise held an appeal to be moot under circumstances closely resembling those in the present case. There qualified Illinois

voters sought to compel the inclusion of certain candidates on the general election ballot of November, 1936. After the election, this Court held the case to be moot and directed that the judgment of the lower court, denying relief, be vacated. These and other decisions of this Court require a dismissal of this appeal after the election. See e.g. *Jones* v. *Montague*, 194 U.S. 147, 24 Sup.Ct. 611, 48 L.Ed. 913 (1904); *Richardson* v. *McChesney*, 218 U.S. 487, 31 Sup.Ct. 43, 54 L.Ed. 1121 (1910); *Love* v. *Griffith*, 266 U.S. 32, 45 Sup.Ct. 12, 69 L.Ed. 157 (1924); *Local No. 8-6, Oil, Chemical and Atomic Workers International Union* v. *Missouri*, 361 U.S. 363, 80 Sup.Ct. 391, 4 L.Ed.2d 373 (1960).

The issues presented are not rendered less abstract by the fact that the injunction also purported to prohibit the proposed constitution from being placed on the ballot at "any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards . . ." (R.200-201). Unlike the Georgia county unit case, *Gray* v. *Sanders*, 372 U.S. 368, 83 Sup.Ct. 801, 9 L.Ed.2d 821 (1963), there is here no statute which constitutes a continuing threat to the constitutional rights of the appellees. Under the amendatory provisions of the Georgia constitution, a constitutional amendment proposed by the General Assembly must be "submitted to the people of the entire State at the *next* general election at which members of the General Assembly are elected." Ga. Const. of 1945, Art. XIII, Section 1, Paragraph 1 (Ga. Code Ann. § 2-8101). As the Supreme Court of Georgia has emphasized, the requirements of this section are mandatory and must be strictly observed. *Seago* v. *Richmond County*, 218 Ga. 151, 126 S.E.2d 657 (1962). In compliance with the requirements of this section, the proposed new state constitution expressly pro-

vided that it be "submitted to the people for ratification or rejection as one single amendment to the Constitution at the next General Election in November, 1964, as provided by law." Art. 9, Section 2, Ga. Laws May-June, 1964 Extraordinary Session 234, at 333.

Before the proposed new constitution can be placed on the ballot for ratification in any future general election, it must again be submitted to the General Assembly and passed by an affirmative two-thirds vote of both houses. Ga. Const. of 1945 Art. XIII, Section 1, Paragraph 1 (Ga. Code Ann. 82-8101). This Court has repeatedly admonished that "constitutional questions are not to be dealt with abstractly." *Local No. 8-6, Oil, Chemical and Atomic Workers International Union* v. *Missouri*, 361 U.S. 363, 370, 80 Sup.Ct. 391, 4 L.Ed.2d 373 (1960). The mere possibility that a similar constitutional proposal may be passed by the General Assembly at some future time is an insufficient basis for invoking the awesome responsibility of constitutional adjudication by this Court. cf. *Poe* v. *Ullman*, 367 U.S. 497, 81 Sup.Ct. 1752, 6 L.Ed.2d 989 (1961); *United States* v. *Alaska S. S. Co.*, 253 U.S. 113, 40 Sup.Ct. 448, 64 L.Ed. 808 (1920). Without further legislative action, this appeal presents only an abstract, hypothetical controversy in which the "lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity" is lacking. *Poe* v. *Ullman*, 367 U.S. 497, 503, 81 Sup.Ct. 1752, 6 L.Ed.2d 989 (1961). Thus, it is clear any question presented by this appeal as to the power of a grossly malapportioned legislature to fundamentally alter the charter of state government by proposing to the electorate an entirely new state constitution is moot. Insofar as the order of June 30, 1964, purports to prohibit the submission of the proposed constitution,

it should now be vacated. *United States* v. *Munsingwear*, 340 U.S. 36, 71 Sup.Ct. 104, 95 L.Ed. 36 (1950). The remaining portions of the order of June 30, 1964 from which no appeal has been taken would, of course, not be affected thereby.[1]

The remaining question as to the existence of any limitations upon the power of the General Assembly during the 1965 term is also moot. On October 7, 1964, the appellants moved in the district court for a modification of the order of June 30, 1964, to eliminate those portions of paragraph 3 which they found objectionable.[2] Although the appellees had never interpreted the order of June 30, 1964 as limiting the powers of the General Assembly, they filed a response consenting to a modification of paragraph 3 of the order. On November 3, 1964,

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[1] No appeal was taken by the appellants from the decision of the district court holding the present apportionment of the Georgia House to be unconstitutional nor was an appeal taken from that portion of the order of June 30, 1964 which restricted the terms of all legislators elected under the unconstitutional apportionment of the November 3, 1964 general election to one year. Similar limitations upon the length of legislative terms have been imposed by other courts as an appropriate exercise of equitable powers to insure prompt reapportionment. See order of September 28, 1964 in *Davis* v. *Mann*, in which the four-year terms for which members of the Virginia Senate were elected in November 1963 were ordered terminated in January of 1966, a year earlier than their normal expiration date. A stay of the order was denied by the Chief Justice on October 28, 1964; order of July 27, 1964 in *W.M.C.A. Inc.* v. *Simon*, in which the terms of members of the New York Legislature were limited to one year. An appeal from this decision is now pending before this Court. (Nos. 611, 623).

[2] For the convenience of the Court, the order of the district court of November 3, 1964, together with the appellants' motion and the appellees' response thereto, are printed as appendices to this motion.

the motion of the appellants was granted by the district court which eliminated from its former order any language which might be construed as restricting the powers of the General Assembly during its 1965 term.[3] Therefore, any question as to the validity of any limitations which may have been thought to exist under the prior order is now moot.

---

[3] The district court denied the appellants' motion to permit the members of the General Assembly to serve full two-year terms without reapportionment. Since no appeal was taken from that portion of the order of June 30, 1964, which restricted the terms of all legislators elected in the November 3, 1964 general election, no question as to the validity of this limitation is presented for determination by this Court. Since, under *Reynolds* v. *Sims*, 371 U.S. 533, 84 Sup.Ct. 1362, 12 L.Ed.2d 506 (1964), the district court was authorized "to insure that no further elections are conducted under the invalid plan," the power of the district court in the exercise of its equitable discretion, to adopt a less drastic remedy, by reducing the length of the terms which legislators would be permitted to serve prior to reapportionment cannot be seriously questioned. Similar limitations have been imposed in Virginia and New York. See footnote 1, *supra*.

CONCLUSION

It is apparent that the questions of which the appellants seek a determination by this appeal have been rendered moot by the November 3, 1964 general election and by the order of the district court of November 3, 1964. Therefore, the appellees respectfully ask that their motion to dismiss this appeal be granted.

Francis Shackelford
Attorney for Appellees

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Joseph B. Cumming
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PROOF OF SERVICE

I, Emmet J. Bondurant, II, attorney for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of November, 1964, I served copies of the foregoing Motion on the appellants herein named, by mailing copies in a duly addressed envelope, with postage prepaid, to Eugene Cook, Attorney General, State of Georgia, State Law Building, Atlanta, Georgia, attorney of record for said appellants.

Emmet J. Bondurant, II

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HENRY J. TOOMBS, ET AL.,
PLAINTIFFS,
v.
BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.,
DEFENDANTS.

CIVIL ACTION
No. 7883

MOTION FOR MODIFICATION OF ORDER

Come now defendants, and move the Court for a modification of its order dated June 30, 1964, and by way of grounds thereof, show as follows:

1.

That paragraph 3 of said order provides as follows:

"(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that notwithstanding anything in Article III, Section IV, Paragraph I (Code Section 2-1601) of the Constitution of Georgia of 1945 to the contrary, the service of the members of the House of Representatives of the General Assembly of the State of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 1965

45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements and as may be necessary to permit the holding of elections to the newly constituted General Assembly, said elections to be held at such times as may be necessary to permit the Members of such General Assembly to take office as soon as practicable, but in no event later than the second Monday in January, 1966."

2.

That the effect of the aforesaid paragraph is threefold, to wit:

(a) Said paragraph delimits the authority of the General Assembly elected in the 1964 November General Election, and which takes office in January, 1965, as to subject matters which it may consider and the authority which it may exercise, in that said paragraph prohibits the House of Representatives, and consequently the entire General Assembly, from performing any duties except "the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session . . ." This limitation effectively precludes said General Assembly from voting bills of impeachment (Constitution, Art. III, Sec. VI, Par. III); conducting investigations; hearing election contests (Id., Sec. VII, Par. I, and cf *Beatty* v. *Myrick*, 218 Ga. 629); electing or removing a state auditor (Code § 40-1801); granting pardons or other relief for persons convicted of treason (Constitution, Art. V, Sec. I, Par. XI); and likewise pro-

hibits said General Assembly from giving consideration to constitutional amendments which are separate as to subject matter (see *11 Am. Jur. 632*, § 28), one or more of which properly are required in connection with a full compliance with other paragraphs of said order requiring reapportionment of the House of Representatives.

(b) Said paragraph limits the service of the General Assembly to service during the regular 45-day session, which precludes the calling of any special sessions should the necessity therefor arise; prohibits any interim committees of the House from functioning; and renders of doubtful legality the expenditure of state funds for operation of the offices of the Speaker, Floor Leader, Clerk and other officials of the House after the 45-day session adjourns.

(c) Said paragraph, in requiring that a reapportioned House of Representatives take office not later than the second Monday in January, 1966, necessarily requires that an election be held during 1965 for the House of Representatives, contrary to the Constitution of Georgia, Article III, Section IV, Paragraph I, (Code § 2-1602), requiring that such elections be held biennially; in even numbered years, thereby raising serious question and doubt as to the legality under the state constitution for any such election to be held during 1965.

3.

Insofar as said paragraph of said order requires that a reapportioned House of Representatives take office in January, 1966, said order in effect thereby requires that members of the House of Representatives vote legislation

to abolish their own terms of office during the middle thereof.

4.

Defendants show that more meaningful reapportionment legislation could be adopted in 1965, and with less difficulty, if the members of the House of Representatives then in session could be permitted to serve out the remainder of their respective terms as heretofore provided by law, and a reconstituted House of Representatives take office in January, 1967, reapportioned in accordance with constitutional requirements.

5.

That because of the foregoing reasons, the order of this Court dated June 30, 1964, should be amended and modified by striking paragraph 3 thereof, and by substituting in lieu thereof, the following:

> "(3) The motion of plaintiffs for further injunctive relief prior to the 1964 November General Election is hereby denied, without prejudice to the right of plaintiffs to reapply to this court for further relief should the General Assembly, which convenes in January, 1965, fail to enact such legislation and constitutional amendments, if any, as may be necessary for a reconstituted House of Representatives to take office not later than the 1967 session, reapportioned in accordance with constitutional requirements."

6.

That in the alternative, and should the Court decline to grant the relief above referred to, the said order of this Court should be amended and modified by striking said paragraph 3 thereof, and by substituting in lieu thereof, the following:

> "(3) The motion of plaintiffs for further injunctive relief prior to the 1964 November General Election is hereby denied, without prejudice to the right of the plaintiffs to reapply to this court for further relief should the General Assembly which convenes in January, 1965, fail to enact such legislation as may be necessary for a reconstituted House of Representatives to take office at the beginning of the session which convenes in January, 1966, reapportioned in accordance with constitutional requirements. To the extent that state statutory and constitutional provisions otherwise might conflict therewith, they are hereby declared to be ineffectual."

7.

That insofar as concerns the granting of the relief referred to in paragraph 6 above, plaintiffs do not object thereto, for in Motion to Affrm filed on their behalf in the Supreme Court of the United States on the appeal by defendants from this Court's order of June 30, 1964, plaintiffs declare:

> "If appellants should see fit to apply to the district court for modification of the order to eliminate

such limitations on the authority of the 1965 General Assembly, appellees will offer no objection to such modification as is necessary to eliminate the restrictions as to which appellants complain in that portion of their jurisdictional statement."

Wherefore, defendants pray:

(1) That a rule nisi issue.

(2) That the order of this court dated June 30, 1964, be modified as set forth in Paragraph 5 hereof, or in the alternative, if such prayer is denied, that said order be modified as set forth in paragraph 6 hereof.

40 Capitol Square
Atlanta, Georgia

EUGENE COOK
The Attorney General

Elberton, Georgia

E. FREEMAN LEVERETT
Deputy Assistant
Attorney General

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

HENRY J. TOOMBS, ET AL., PLAINTIFFS,

v.

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL., DEFENDANTS.

CIVIL ACTION No. 7883

RESPONSE OF PLAINTIFFS TO PROPOSED MODIFICATION OF ORDER OF JUNE 30, 1964

In response to this Court's direction of October 29, 1964, the plaintiffs respectfully file this response with respect to the proposed modification of paragraph (3) of the order of June 30, 1964:

1. As the plaintiffs stated in their Brief in Opposition to Defendants' Motion for Stay Pending Appeal, pages 12-13, and their Motion to Affirm, pages 19-20, which were filed in the Supreme Court of the United States in connection with the appeal of the above case, the plaintiffs never interpreted the order of June 30, 1964 as prohibiting the 1965 General Assembly from performing the duties and functions asserted by the defendants in paragraph 2 of their Motion filed before this Court. However, the plaintiffs continue to be, as they have been in the past, fully desirous of cooperating with the defendants in order that reapportionment of the General Assembly in conformity with the requirements of the Fourteenth Amendment can be expeditiously accom-

plished without undue interference with or limitations upon its powers during the interim period prior to such reapportionment.

2. To this end the plaintiffs are in full accord with and hereby consent to a modification of paragraph (3) of the order of June 30, 1964 in conformity with the tentative draft of October 29, 1964.

Respectfully submitted,

Francis Shackelford
Attorney for Plaintiffs

Edward S. White	Joseph B. Cumming
Israel Katz	J. Quentin Davidson
Emmet J. Bondurant, II	John E. Simpson
Hamilton Lokey	Raymond M. Reed
William B. Gunter	John W. Sognier
A. R. Kenyon	Albert P. Reichert

PROOF OF SERVICE

I, Emmet J. Bondurant, attorney for plaintiff herein, hereby certify that on the 30th day of October, 1964, I served copies of the foregoing Response on the defendants therein named, by mailing copies in a duly addressed envelope, with postage prepaid, to Eugene Cook, Attorney General, State of Georgia, State Law Building, and E. Freeman Leverett, Assistant Attorney General, 25 Thomas Street, Elberton, Georgia, attorneys of record for said defendants.

Emmet J. Bondurant

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HENRY J. TOOMBS, ET AL.,
PLAINTIFFS,
v.
BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.,
DEFENDANTS.

CIVIL ACTION
No. 7883

The defendants filed a motion on October 7, 1964, seeking a modification of the order of this Court entered June 30, 1964. The motion sought a change that would remove the requirement that the General Assembly of the State of Georgia pass such legislation as required to effect a valid apportionment of the seats in the House of Representatives during the 1965 session, and sought a change that would permit the term of the members of the House of Representatives to extend through the calendar year 1966. In the alternative, the motion sought a clarification of the provisions of paragraph 3 of the said order of June 30, 1964, to make it clear that such members would remain duly qualified to perform all the duties of the office except as specifically limited in the order.

It appearing that this Court's order was entered sufficiently in advance of the date of this year's elections

to permit each candidate to become thoroughly familiar with limitations of the terms of service, and it further appearing that ample time was provided for the General Assembly, either at a special session this year or at the 1965 regular session, to enact proper apportionment legislation prior to January, 1966, the motion to change the order by extending the term through the year 1966 is hereby DENIED.

Both parties agree that the motion for alternative relief should be granted. Therefore, paragraph 3 of the order of June 30, 1964, is hereby stricken and the following paragraph 3 is substituted in lieu thereof:

> "(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that, notwithstanding anything in Article III, Section IV, Paragraph I (Code Section 2-1601) of the Constitution of Georgia of 1945 to the contrary, the service of the members of the House of Representatives of the General Assembly of the State of Georgia to be elected at the General Election in November, 1964, shall be limited to a term of one year's duration and provided further that the plaintiffs shall have the right to reapply to this Court for further relief should the General Assembly, which convenes in January, 1965, fail to enact, during the regular 1965 45-day session, as provided in the Georgia Constitution, such legislation as may be necessary for the General Assembly to be reapportioned in accordance with Constitutional requirements and as may be necessary to permit

the holding of elections to the newly constituted General Assembly during the calendar year 1965, which elections are to be held at such time as may be necessary to permit the members of such newly constituted General Assembly to take office no later than the second Monday in January, 1966. To the extent that state statutory and constitutional provisions might otherwise conflict with such legislative reapportionment, they are hereby declared to be void and of no effect."

This 3rd day of November, 1964.

Elbert P. Tuttle
United States Circuit Judge

Griffin B. Bell
United States Circuit Judge

Lewis R. Morgan
United States District Judge

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 300

BEN W. FORTSON, JR., ET AL., APPELLANTS,

vs.

HENRY J. TOOMBS, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE APPELLEES

STATEMENT OF FACTS

This action was brought in 1962 seeking reapportionment of both houses of the Georgia legislature in conformity with the requirements of the Fourteenth Amendment (R. 15). The district court found the disparities existing in both houses to be so extreme as to amount to invidious discrimination against appellees. It ordered the prompt reapportionment of one house and held that it was not necessary at that time to make a final determination whether the other house could remain completely unrelated to population ratios. *Toombs v. Fortson*, 205 F.Supp. 248 (N.D. Ga. 1962) (R. 65). The court retained jurisdiction for the entry of such further orders as might be required. In compliance with the order, the Georgia Senate was reapportioned in October, 1962.

On June 17, 1964, following the decision of this Court in *Reynolds* v. *Sims*, 377 U.S. 533, 84 Sup.Ct. 1362, 12 L.Ed. 2d 506 (1964) and its companion cases, appellees moved in the district court to compel reapportionment of the House of Representatives of the Georgia General Assembly prior to the November 1964 general election. (R. 98). Under the 3-2-1 system of apportionment of the Georgia House, 22% of the people residing in 103 rural counties control an absolute majority of the 205 House seats. A voter in Echols County has 100 times the effective representation in the House of Representatives than those who reside in Fulton County. Fulton County, with over 14% of the State's total population, is represented by only 3 of the 205 House seats. The glaring disparities in the apportionment of the House of Representatives are more fully stated in the district court's initial opinion in *Toombs* v. *Fortson*, 205 F.Supp. 248, 251 (N.D. Ga. 1962) (R. 65) and are identical with the disparities existing under the Georgia county-unit system which was struck down by this Court in *Gray* v. *Sanders*, 372 U.S. 368, 83 Sup.Ct. 801, 9 L.Ed. 2d 821 (1963).

At the hearing in the district court, appellants made no attempt to defend the constitutionality of the system under which the House of Representatives has been apportioned for more than 96 years. Appellants asked only that reapportionment be delayed two more years until January 1967.

At the time of the hearing in the district court the Georgia General Assembly was then convened in an extraordinary session to prepare a new constitution for submission to the people for ratification at the November 1964 general election in the form of a "package

amendment" to the existing constitution. In order to be placed on the ballot as an "amendment", the proposed constitution had to secure a two-thirds affirmative vote in the severely malapportioned House of Representatives. Consideration by the fairly apportioned Senate of each of the myriad proposals contained in the revised constitution had to take this dominant political factor into account.

Following hearings on June 19 and 24, the district court on June 30, 1964 entered an order permitting reapportionment to be deferred until after the November 3, 1964 general election. (R. 200-201). However, during the interim it enjoined the appellants, state election officials, from placing the question whether any entirely new constitution should be adopted in the form of an amendment to the present constitution on the ballot in any election pending reapportionment of the General Assembly. (R. 200-201). The injunction did not prevent the submission to the electorate of individual constitutional amendments, separated as to subject matter, nor did it prohibit the calling of a constitutional convention of delegates elected by the people on the basis of population, as provided by the Georgia constitution. (R. 200-201). On July 6, 1964, the appellants' application for a stay pending appeal was denied by Mr. Justice Black.

On October 7, 1964, the appellants again moved in the district court for a modification of its order of June 30, to permit reapportionment to be delayed for two more years, or, in the alternative, for the elimination of certain language from the order which they interpreted as unduly restricting the powers of the General Assembly. The district court on November 3, 1964 denied the requested delay of reapportionment, but granted

the alternative request and eliminated the restrictive language as requested by the appellants. For the convenience of the Court, the appellants' motion together with the appellees' response thereto and the order of November 3, 1964, which are not included in the printed record, have been printed in full in the appendix to the Motion to Dismiss of the appellees.

ARGUMENT

The District Court Did Not Abuse its Discretion in Enjoining, Pending Fair Reapportionment, the Proposal of An Entirely New State Constitution By A Grossly Malapportioned Legislature.

After the decision of this Court in *Reynolds* v. *Sims*, 377 U.S. 533, 84 Sup.Ct. 1362, 12 L.Ed. 2d 506 (1964), it can no longer be disputed that the egregious disparities in representation in the House of Representatives of the Georgia General Assembly of more than 100 to 1, which exist under the arbitrary 3-2-1 system of apportionment, are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

Under the *Reynolds* decision, an order requiring immediate reapportionment of the General Assembly prior to the November 3, 1964 general election would clearly have been appropriate. As this Court there emphasized; "Once a state's legislative apportionment scheme has been found to be unconstitutional it would be the *unusual* case in which a court would be justified in not taking appropriate action to insure that *no further elections are conducted under the invalid plan.*" *Reynolds* v. *Sims*, 377 U.S. 533, 585, 84 Sup.Ct. 1362,

12 L.Ed. 2d 506 (1964) (Emphasis supplied). Although this Court recognized that relief might be withheld "Where an impending election is imminent and a state's election machinery is already in progress," it expressly held that the district court acted with proper judicial restraint when it ordered immediate reapportionment of the Alabama legislature on July 21, 1962 (a month later than in the present case), "at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty," notwithstanding the fact that all candidates for election to the Alabama legislature had already been nominated in party primaries which had been held in May. 377 U.S. at 586.

At the time of the hearings in the district court on June 19 and 24, only 52 Democratic candidates and no Republican candidates had been nominated to the 205 member Georgia House of Representatives. Although the General Assembly was then convened in extraordinary session, and ample time remained during which reapportionment might have been accomplished,[1] the district court, in deference to the appellants' requests for delay, refused to require that the House be reapportioned prior to the November 3, 1964 general election. Guided by general equitable principles, the court sought "an accommodation between the relief which would permit the Legislature to reapportion itself, and yet would leave to such reapportioned Legislature the performance of its legislative duty . . . ." (R. 169). Accord-

---

[1] Previously in *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962), the district court in September 1962, required immediate reapportionment of the Georgia Senate prior to the November 1962 general elections. Despite the comparative shortness of time remaining before the general election, reapportionment was accomplished promptly and without difficulty.

ingly, the court concluded "that adequate protection of the rights of plaintiffs and their class can be afforded without . . . interfering with the normal election procedures in this election year." (R. 167) The terms of service of the members of the General Assembly elected at the November 3, 1964 general election were limited to one year, during which the Assembly has the opportunity to enact a fair reapportionment and the necessary enabling legislation in order that members of the newly-constituted General Assembly may take office in January 1966. (R. 200-201, and see the order of November 3, 1964). No appeal has been taken by the appellants from this portion of the order of June 30, 1964.[2]

However, the district court recognized that the malapportioned General Assembly was then convened in

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[2] Since no appeal was taken from that portion of the order of June 30, 1964, which restricted the terms of all legislators elected in the November 3, 1964 general election, no question as to the validity of this limitation is presented for determination by this Court. Since, under *Reynolds* v. *Sims*, 377 U.S. 533, 84 Sup.Ct. 1362, 12 L.Ed.2d 506 (1964), the district court was authorized "to insure that no further elections are conducted under the invalid plan," the power of the district court, in the exercise of its equitable discretion, to adopt a less drastic remedy, by reducing the length of the terms which legislators would be permitted to serve prior to reapportionment cannot be seriously questioned. Similar limitations upon the length of legislative terms have been imposed by other courts as an appropriate exercise of equitable powers to insure prompt reapportionment. See order of September 28, 1964 in *Davis* v. *Mann*, in which the four-year terms for which members of the Virginia Senate were elected in November 1963 were ordered terminated in January of 1966, a year earlier than their normal expiration date. A stay of the order was denied by the Chief Justice on October 28, 1964; order of July 27, 1964 in *W.M.C.A. Inc.* v. *Lomenzo*, in which the terms of members of the New York Legislature were limited to one year. An appeal from this decision is now pending before this Court. (Nos. 611, 623).

extraordinary session for the limited purpose of enacting a comprehensive new election code and proposing an entirely new state constitution which "will be a basic law of the State until and unless amended in the future . . . by a two-thirds vote of the two houses of a properly apportioned General Assembly." (R. 167). The court held that to permit the grossly malapportioned General Assembly to fundamentally alter the charter of state government by proposing to the electorate an entirely new state constitution would be inconsistent with this Court's mandate in *Reynolds* v. *Sims*. (R. 167). Accordingly, the appellants were enjoined from "placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted." (R. 200-201).

The issuance of this injunction was clearly necessary to prevent irreparable injury to the plaintiffs and their class until reapportionment of the House of Representatives is accomplished. Indeed, similar relief was granted in the *Reynolds* case, in which, as this Court observed, the district court prevented the proposed 67-senator amendment from being placed on the ballot for ratification at the general election by invalidating it prospectively. See *Reynolds* v. *Sims*, 377 U.S. at 570, footnote 48.

As this Court emphasized in *Reynolds* v. *Sims*:

"Remedial technique in this new and devel-

> oping area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions." 377 U.S. at 585.

To guide the district courts in moulding their decrees this Court quoted from the concurring opinion of Mr. Justice Douglas in *Baker* v. *Carr* that "any relief accorded can be fashioned in the light of well-known principles of equity."

This Court's directions to the district courts in *Reynolds* v. *Sims* are remarkably similar to those in the school desegregation cases. There, the Court said:

> "Full implementation of these constitutional principles may require solution of varied local school problems . . . In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power." *Brown* v. *Board of Education*, 349 U.S. at 294, 299-300, 75 Sup.Ct. 753, 99 L.Ed. 1083 (1955).

In the present case the district court, having rejected the prayer of the appellees for immediate relief, followed the mandate of this Court to act and rely on general equitable principles and provided an "accommodation" to safeguard the interests of appellees and their class during the continued suspension of their constitu-

tional rights while the decree is being carried out. In so doing the Court applied the undoubted power of a court of equity to "prescribe the performance of conditions designed to protect the rights of the parties pending appeal . . . or to protect temporarily the public interest while its decree is being carried into effect." *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U.S. 264, 271, 54 Sup.Ct. 154, 78 L.Ed. 307 (1933).

It cannot be seriously disputed that by far the most important stage in the adoption of a new constitution is that of drafting the basic principles to be included within its provisions. After adoption of a constitution by the legislature, the people can only accept or reject it in its entirety—they are without power to rewrite the document submitted to them, no matter how odious individual provisions may be. As the Supreme Court of California emphasized in *McFadden* v. *Jordan*, 32 Cal. 2d 330, 196 P. 2d 787, 796-97 (1948):

> "The proposal is offered as a single amendment but it obviously is multifarious. It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all. Such an appeal might well be proper in voting on a revised constitution, proposed under the safeguards provided for such a pro-

cedure, but it goes beyond the legitimate scope of a single amendatory article."

To be unfairly excluded from this initial stage in the formulation of a new constitution is to be cut off from the very well-springs of government. At this point in the political process, more than at any other, to the extent that an individual is inadequately represented "he is that much less a citizen." See *Reynolds* v. *Sims*, 377 U.S. at 567.

It is no answer that the constitution which has been proposed by a malapportioned General Assembly will be submitted in its entirety for ratification by the people at the general election. As this Court emphasized in *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736, 84 S. Ct. 1472, 12 L.Ed. 2d 632 (1964). "an individual's constitutionally protected right [to full and effective participation in the political processes of the State's legislative bodies and] to cast an equally weighted vote can not be denied even by a vote of a majority of a State's electorate. . . ." As the district court observed in the present case, a constitutional provision adopted by an invalidly apportioned legislature, unlike an ordinary statute, cannot be changed after reapportionment by a simple majority. The fact that the proposed constitution can be amended only by a two-thirds vote of both Houses effectively locks the provisions into the document.

Appellants have chosen to ignore in their argument the fact that the district court was careful to leave open the power to propose and adopt constitutional amendments or even an entirely new constitution by means less likely to result in irreparable injury to the right

of the plaintiffs to participate in the political processes of republican government. The appellants were expressly authorized to place individual amendments on the ballot, separated as to subject matter as required by the Georgia Constitution (Ga. Const. 1945, Article XIII, Section I, Paragraph I, Ga. Code Sec. 2-8101), for acceptance or rejection by the people on an individual basis. The order further stated that it should not prevent the General Assembly from calling a "convention of the people to revise, amend or change the constitution" in which convention, representation is "based on population as nearly as practicable" in accord with Article XIII, Section I, Paragraph II, of the Georgia Constitution of 1945. (Ga. Code Sec. 2-8102). The state has full power to amend the present constitution in any respect which it may deem necessary or appropriate. The only restriction imposed by the order of the district court is to require that it do so in a manner which is not unduly destructive of the rights of the class represented by appellees during the interim period prior to the time that they are fully and adequately represented in both houses of the General Assembly. cf. *Shelton* v. *Tucker*, 364 U.S. 479, 488, 81 Sup.Ct. 247, 5 L.Ed. 2d 231 (1960).

II. **The District Court Correctly Held, As A Matter of State Law Within Its Pendant Jurisdiction, That The Georgia General Assembly Has No Authority To Propose To The Electorate An Entirely New State Constitution In The Form of An Amendment To The Present Constitution.**

Ancillarly to its determination of the federal questions (cf. *Hurn* v. *Oursler*, 289 U.S. 238, 53 Sup.Ct. 586, 77 L.Ed. 1148 (1933)), the district court held that the

General Assembly had no authority to propose an entirely new state constitution[3] as a single "amendment" for ratification by the electorate. Under the Georgia Constitution of 1945, the General Assembly is authorized to propose individual amendments to the state constitution which must be submitted to the electorate in such manner "as to enable the electors to vote on each amendment separately." Ga. Const. of 1945, Art. XIII, Section I, Paragraph I, Ga. Code Ann. §2-8101. The General Assembly has no power to propose a new or revised constitution, (*Wheeler* v. *Board of Trustees of Fargo Consolidated School District*, 200 Ga. 323, 37 S.E. 2d 322 (1946)), which must be proposed by constitutional convention in which "representation . . . shall be based on population as near as practicable." Ga. Const. of 1945, Art. XIII, Section I, Paragraph II, Ga. Code Ann. §2-8102. As the Supreme Court of Georgia has emphasized, " 'The procedure and requirements established for the amendment of the fundamental law are mandatory and must be strictly followed, in order to effect a valid amendment.' " *Seago* v. *Richmond County*, 218 Ga. 151, 154, 126 S.E. 2d 657 (1962).

In reliance upon these decisions, and upon the decision of the Supreme Court of Georgia in *Wheeler* v. *Board of Trustees of Fargo Consolidated School District*, 200 Ga. 323, 329-30, 37 S.E. 2d 322 (1946), the district court held the General Assembly to be without authority to propose an entirely new constitution, under the guise of an amendment and, accordingly, enjoined its submission for ratification at the November 3, 1964 general election. Since the case was one arising under the Civil

[3] The proposed revised constitution is contained in Ga. Laws 1964, May-June Extraordinary Session 234.

Rights Act, the district court did not abuse its discretion in refusing to abstain. *McNeese* v. *Board of Education*, 373 U.S. 668, 83 Sup.Ct. 1433, 10 L.Ed. 2d 622 (1963).

The decision of the district court, holding the proposed "amendment" to be invalid, is fully consistent with that of the Georgia Supreme Court in *Wheeler* v. *Board of Trustees of Fargo Consolidated School District*, 200 Ga. 323, 37 S.E. 2d 322 (1946). In 1945, the General Assembly proposed as "one single amendment," a complete revision of the Constitution of 1877, which was subsequently ratified by the electorate. Following its ratification, suit was brought to invalidate the revision as having been improperly adopted. Proponents of the 1945 revision sought to sustain its validity as an amendment to the Constitution of 1877. Holding the 1945 revision not to be a valid amendment to the Constitution of 1877, the Supreme Court of Georgia said:

> "We conclude that the instrument . . . is not an amendment to the constitution of 1877; but on the contrary it is a completely revised or new constitution." 200 Ga. at 330, 37 S.E. 2d at 327.

The Court noted that in drafting the proposed constitution, the Georgia legislature, like the Federal Convention which drafted the Constitution of the United States, was no more than " 'a mere assemblage of private citizens, and their work had no more binding sanction than a constitution drafted by Mr. Hamilton, in his office, would have had.' " 200 Ga. at 332, 37 S.E. 2d at 328 (1946). However, the Court refused to hold the constitutional convention to be the exclusive method of adoption of a new constitution. Notwithstanding the

irregular origin of the 1945 revision, the Court held it to have been validated as the result of its ratification by the people. Thus, the Court said:

> "When the people adopt a completely revised or new constitution, the framing or submission of the instrument is not what gives it binding force and effect. The fiat of the people, and only the fiat of the people, can breathe life into a constitution." 200 Ga. at 333, 37 S.E. 2d at 328-29 (1946).

Thus, it is clear that the portions of the *Wheeler* case, relied on by the appellants, stand only for the proposition that after a constitutional revision has been ratified by the people at a valid election, it may not, thereafter, be attacked on grounds that it was proposed in an irregular or unauthorized manner. It is equally clear, however, that the *Wheeler* decision does not purport to authorize circumvention by the General Assembly of the clear provisions of the state constitution by attempts to disguise broad constitutional revisions under the subterfuge of a single amendment which must be accepted or rejected by the electorate as a package. Indeed, the spirit, if not the letter of the *Wheeler* decision, is precisely to the contrary.

The courts of other states have reached similar conclusions. For example, in *Livermore* v. *Waite*, 102 Cal. 113, 36 Pac. 424, 426 (1894), a suit was brought to enjoin the Secretary of State of California from submitting to the electorate a proposed constitutional "amendment" which was in fact a complete revision of the constitution. There, the court in affirming the injunction issued by the lower court said:

> "The Legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment, . . ."

In *McFadden* v. *Jordan*, 32 Cal. 2d 330, 196 Pac. 2d 787 (1948), in which the legislature of California proposed an "amendment" to the California Constitution, suit was brought to prohibit the proposed change from being placed on the ballot. The court granted the injunction, holding that the proposed change was a "revision" rather than an "amendment" and hence could not be proposed or initiated by the legislature. See also *Carton* v. *Secretary of State*, 151 Mich. 337, 115 N. W. 429, 430 (1908), and *Ellingham* v. *Dye*, 178 Ind. 336, 99 N. E. 1, 10 (1912).

It is clear, therefore, that the district court correctly enjoined the submission as a single amendment of the proposed revised state constitution in violation of the provisions of the Georgia constitution.

CONCLUSION

In preventing the proposal of an entirely new state constitution by the grossly malapportioned General Assembly, pending reapportionment, the district court reached a practical "accommodation" which permits the continued adoption of constitutional amendments on specific matters of importance to the state and, yet, affords to the appellees some measure of protection during the interim while fair reapportionment is delayed. It is manifest that the remedy framed by the district court is a sound adaptation of general equitable prin-

ciples to local conditions, and fulfills not only the spirit, but the letter of the decision of this Court in *Reynolds* v. *Sims*. The appellees respectfully pray, therefore, that the decisions below be affirmed.

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PROOF OF SERVICE

I, Emmet J. Bondurant, II, attorney for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of November, 1964, I served copies of the foregoing Brief on the appellants herein named, by mailing copies in a duly addressed envelope, with postage prepaid, to Eugene Cook, Attorney General, State of Georgia, State Law Building, Atlanta, Georgia, attorney of record for said appellants.

Emmet J. Bondurant, II

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 300

BEN W. FORTSON, JR., ET AL., APPELLANTS,

vs.

HENRY J. TOOMBS, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MEMORANDUM

This supplemental memorandum is submitted in order to clarify the position of the appellees with respect to certain questions which arose during oral argument.

I.

The District Court Did Not Abuse its Discretion in Enjoining, Pending Fair Reapportionment, the Proposal of An Entirely New State Constitution By A Grossly Malapportioned Legislature.

Two points are now clear beyond any doubt. First, the Georgia House of Representatives is malapportioned by federal constitutional standards. Appellants concede that fact. Second, under the rationale of *Reynolds* v. *Sims* 377 U.S. 533, 84 Sup.Ct. 1362, 12 L.Ed. 2d 506 (1964), such malapportionment has the effect of denying to appellees and others similarly situated their constitutional rights under the Fourteenth Amendment. Under normal rules

of constitutional adjudication appellees would be entitled to immediate relief. Cf. *Ex parte Milligan*, 71 U.S.(4 Wall.)2, at 121, 18 L.Ed. 281 (1866).

In *Reynolds* v. *Sims*, as in the school segregation cases, this Court recognized that in some instances the shock of a grant of immediate relief to the plaintiffs in such cases would be so severe that a period of adjustment and transition must be allowed in the interest of orderly government. The length of this period of adjustment was left to the discretion of district courts on the assumption that they, being more familiar with local conditions, are in a better position than is this Court to make a wise and practical evaluation of the relevant circumstances and to mould their decrees in accord with traditional equitable principles in such manner that fair reapportionment may be achieved in an orderly, yet expeditious, manner.

In the present case, the district court recognized that, under its mandate from this Court in *Reynolds v. Sims*, it was authorized to employ the normal powers of a court of equity to protect the rights of the parties during the period of transition and to take such protection into account in determining the length of the period of adjustment. The district court therefore granted the State one and one-half years within which to bring about a fair reapportionment. It allowed this additional time on the assumption that such an "accommodation", including the injunction restraining the submission of a new constitution pending reapportionment, was within its equity powers.

Indeed, as *Reynolds* v. *Sims* makes clear, after a state legislature has been judicially determined to be invalidly apportioned, the federal constitutional rights of the appellees and other under-represented citizens to full and

equal participation in the political processes are violated by the continued functioning of the defectively constituted legislature. Thus, after the order of June 19, 1964, all activity of the General Assembly, including the passage of legislation and the proposal of the new constitution, violated the constitutional rights of the appellees. However, the district court recognized that the interest of orderly government during the interim prior to reapportionment required that the General Assembly be permitted to function even at the expense of the rights of the appellees. Only one limitation upon its powers was imposed — that the General Assembly should not, so long as the appellees are not fairly represented therein, draft and submit to the people an entirely new charter of state government which would not be subject to modification after reapportionment except by a two-thirds vote of both houses of the legislature.

During the oral argument before this Court on November 19, 1964, Mr. Justice Stewart inquired whether the submission of a new constitution to the voters by a malapportioned legislature constituted a violation of the federal constitutional rights of the under-represented voters. For the reason just given, in the framework of the present case, the answer is necessarily "yes". Since June 19, 1964 all of the activities of the Georgia General Assembly have violated such rights of appellees and such violations will continue until a proper reapportionment has been achieved.

However, nothing in the order of the district court purports to require that constitutional amendments be proposed only by a representative legislative body apportioned in accordance with the decision of this Court in *Reynolds* v. *Sims*. The proposal of constitutional amend-

ments by 3% of the people, as suggested by Mr. Justice Stewart during the oral argument, is not inconsistent with the injunctive relief granted by the district court. The present case does not involve the proposal of a new constitution by a minority of the electorate, as is possible in states enjoying broad initiative measures. In those states citizens may, if dissatisfied with constitutional proposals submitted by their legislatures, present alternative proposals or initiate new ones for the consideration of the electorate. Other citizens are free to make counter proposals, thus giving the electorate a fair choice between competing views. In contrast to minority legislative rule, such initiative measures make state governments more, rather than less, responsive to the will of the people. Thus, it is clear that the proposal of a constitutional amendment by a minority of the electorate is not, *per se*, invalid. It is only where, as in Georgia, the power to initiate all such proposals is limited to a court-declared malapportioned legislature, that it becomes invalid.

In Georgia, there exists no procedure for the proposal of constitutional amendments by the electorate. Under the Georgia Constitution of 1945, all proposals for amendments to the constitution must originate with the grossly malapportioned General Assembly. Ga. Const. 1945, Art. XIII, Section I, Para. 1 (Ga. Code Ann. § 2-8101). And a constitutional convention cannot be convened without the concurrence of two-thirds of the membership of the General Assembly. Ga. Const. 1945, Art. XIII, Section I, Para. 2, Ga. Code Ann. § 2-8102. All constitutional proposals must, therefore, pass through the knothole of the grossly malapportioned House of Representatives prior to submission to the people. For these reasons the hypo-

thetical situation posed by Mr. Justice Stewart is not involved in this case.

The sole question on this appeal is whether the district court, in determining the period of transition, can employ its traditional equitable powers to mitigate in some degree the continued deprivation of the constitutional rights of appellees.

Appellants contend that the power of the district court is limited to the determination of the length of the period of transition and that the court can take no action whatever for the protection of appellees or to mitigate their circumstances during such period.

It is apparent that the extent to which appellees are affected by the continued deprivation of their constitutional rights during the period of adjustment is a matter of degree. Some of the activities of the malapportioned legislature during such period may be relatively harmless to appellees and others may be highly oppressive. However, no action by a malapportioned General Assembly is more pernicious to the rights of the appellees than the proposal of an entirely new state constitution which cannot be changed, after reapportionment, without the concurrence of two-thirds of the membership of both houses of the General Assembly. It is apparent that the district court necessarily took these factors into account in framing its decree.

For these and the other reasons set out in appellees' previous briefs, the district court should not be hamstrung in carrying out the mandate of this Court in reapportionment cases.

II.

MOOTNESS

Since The Proposal of A New Constitution By The 1965 General Assembly Is Highly Speculative and Problematical, The Injunction With Respect Thereto Is Moot.

It was conceded by counsel for the appellants on oral argument that the proposed constitution drafted by the General Assembly for submission at the November 3, 1964, general election (Ga. Laws, May-June 1964 Extraordinary Session 234) is now dead. Any question as to the propriety of that portion of paragraph 2 of the order of June 30, 1964, which prohibited its submission at the November 3, 1964 general election is clearly moot. The only other question presented by the appeal is whether the remaining language of paragraph 2 of the order which prohibited a proposed new constitution from being placed on the ballot at "any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards . . . ." (R. 200) is now moot.

In order that their position may not be misunderstood, the appellees desire to make it emphatically clear that they do not intend to waive or renounce their rights to such relief. Indeed, should the 1965 General Assembly again attempt to propose a new constitution prior to the time that it is reapportioned, the appellees would fully expect to apply to the district court to restrain its submission. While it is possible, as an abstract matter, that the same draft may again be proposed by the 1965 General Assembly, this certainly appears to be highly unlikely. Since 20 new members of the 54-seat Senate and 67 new members of the 205-seat House of Representa-

tives were elected in November, 1964 and did not participate in the preparation of the 1964 draft, it is certain as practical matter that, if any new constitution is to be proposed by the 1965 General Assembly, it must be hammered out as a new document. Indeed, it is completely speculative whether any such proposal will be made by the newly elected General Assembly. Under the standards established by this Court, it is clear that the case is now moot. See *e.g. Poe* v. *Ullman*, 367 U.S. 497, 81 Sup.Ct. 1752, 6 L.Ed. 2d 989 (1961); *Local No. 8-6, Oil Chemical and Atomic Workers International Union* v. *Missouri*, 361 U.S. 363, 80 Sup.Ct. 391, 4 L.Ed. 2d 373 (1960); *Love* v. *Griffith*, 266 U.S. 32, 45 Sup.Ct. 12, 69 L.Ed. 157 (1924); *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 40 Sup.Ct. 448, 64 L.Ed. 808 (1920); *Mills* v. *Green*, 159 U.S. 651, 16 Sup.Ct. 132, 40 L.Ed. 293 (1895).

Because of the abstract and hypothetical nature of the controversy with respect to the possible proposal of an entirely new constitution by the 1965 General Assembly, the attorneys for appellees felt themselves obligated to bring this matter to the attention of the Court and to move for dismissal of the appeal on this ground.

In the event this Court should hold this appeal to be moot, paragraph 2 of the order of June 30, 1964, (R. 200) prohibiting the submission of a proposed constitution, should be vacated (*United States* v. *Munsingwear*, 340 U.S. 36, 71 Sup.Ct. 104, 95 L.Ed. 36 (1950)), without prejudice to the right of the appellees, or of any other qualified Georgia citizens, to apply for a similar injunction should the 1965 General Assembly attempt to propose a new constitution. The remaining portions of the order of June 30, 1964, as modified November 3, 1964, holding unconstitutional the present 3-2-1 apportion-

ment, and restricting the terms of legislators elected at the November 3, 1964 general election, from which no appeal has been taken, would, of course, not be affected thereby.

Respectfully submitted,

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PROOF OF SERVICE

I, Emmet J. Bondurant, II, attorney for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of November, 1964, I served copies of the foregoing Motion on the appellants herein named, by mailing copies in a duly addressed envelope, with postage prepaid, to Eugene Cook, Attorney General, State of Georgia, State Law Building, Atlanta, Georgia, attorney of record for said appellants.

Emmet J. Bondurant, II

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No 300

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia, A. B. TOLLISON, Ordinary of Forsyth County, Georgia; ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia; and JIM W. DICKERSON, Ordinary of Cherokee County, Georgia,
Appellants,

vs.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON, and JOHN L. GLENN,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

Appellants' Reply to Supplemental Memorandum of Appellees

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No 300

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia, A. B. TOLLISON, Ordinary of Forsyth County, Georgia; ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia; and JIM W. DICKERSON, Ordinary of Cherokee County, Georgia,
Appellants,

vs.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON, and JOHN L. GLENN,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

APPELLANTS' REPLY TO SUPPLEMENTAL MEMORANDUM OF APPELLEES

I

The Case Is Not Moot

The order here having enjoined submission of a proposed new state constitution **"at any subsequent election** until the General Assembly is reapportioned

in accordance with constitutional standards" (R. 200), this case manifestly differs from **Mills v. Green,** 159 U. S. 651 (1895), **Blackman v. Stone,** 17 F. Supp. 102 (D. C. Ill. 1936), vacated 300 U. S. 641 (1937); **Jones v. Montague,** 194 U. S. 147 (1904); **Richardson v. McChesney,** 218 U. S. 487 (1910), and **Love v. Griffith,** 266 U. S. 32 (1924), relied upon by appellees. In each of these latter cases, the injunctive relief sought **related to a particular election only,** which had been held pending appeal. As stated in **Southern Pacific Terminal Co. v. I.C.C.,** 219 U. S. 498, 514 (1911), referring to the line of cases relied upon by appellees:

> ". . . But in those cases the Acts sought to be enjoined had been completely executed, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected."

In the case at bar, the injunction relates "to any future election . . .," and not merely to the election held in November, 1964. Where, as here, an order imposes an "obligation" of a "continuing character," the case is not moot. **J. I. Case Co. v. N.L.R.B.,** 321 U. S. 332 (1944). The mere fact that the injunction was obeyed at a time in the past (here, the 1964 election) does not moot the case, because "(A)n order of the character made . . . does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

N.L.R.B. v. Greyhound Lines, 303 U.S. 261 (1938); **Amalgamated Association v. Wisconsin Employment Relations Board**, 340 U.S. 416 (1951); **United States v. Trans-Missouri Freight Association**, 166 U.S. 290 (1897); **Federal Trade Commission v. Gooodyear Tire & Rubber Co.**, 304 U.S. 257 (1938). Even where an injunctive order is vacated, the case is not moot where the underlying controversy has not been settled. **Division 1287, Amalgamated Association v. Missouri**, 374 U.S. 74, 78 (1963), and see **Southern Pacific Co. v. I.C.C.**, 219 U.S. 433, 452 (1911).

The fact that the controversy is far from settled here is borne out by Appellees' Supplemental Memorandum, where it is unequivocally stated that should the General Assembly seek to submit a new constitution prior to reapportionment, the appellees "would fully expect to apply to the district court to restrain its submission" (p. 6). No doubt such an injunction would be sought by appellees or some other litigants at a late hour shortly before the 1966 General Election[1] at a date when sufficient time would not remain to secure review by this Court. This was precisely the type of situation condemned in **Southern Pacific Terminal Company v. I.C.C.**, 219 U.S. 498, 514 (1911), where, in holding subject to review an order of the Commission notwithstanding that it had expired by its own terms, this Court declared:

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[1] Under the existing state constitution, Art. XII, Sec. 1, proposed constitutional measures can be submitted to the voters only in the November General Election held in even-numbered years.

"In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and those considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government, and at another time the carrier, have their rights determined by the Commission without a chance of redress."

In short, an injunctive order properly is vacated only when the controversy is already moot; the order should not be vacated for the express purpose of avoiding review and thereby making it moot. No more pernicious doctrine could be concocted than for a court, either trial or appellate, alternately and successively, to vacate and reinstate an injunctive order simply as a means of avoiding review.

Moreover, the fact that a somewhat differently-composed General Assembly would re-submit the proposed constitution, or that the re-submitted version likely would differ in content from the 1964 version, is completely irrelevant under the legal theory relied upon by the district court below. Its basis of decision was that **any** constitution proposed by a malapportioned legislature is, **ipso facto,** constitutionally defective, without regard to its substantive content. Under this rationale, it is immaterial whether the future General Assembly re-submits the identical document, or for

that matter, such a forward-looking model as that proposed by the National Municipal League.[2] In either case, the result is the same. In the more usual-type situation, where a law is attacked because of some defect inherent in its substance, the repeal or amendment of the law pending review generally is to moot the case, for the reason that the legal issues necessarily are altered. This was the situation in **United States v. Alaska Steamship Co.**, 253 U.S. 113 (1920). Here, the basis of attack is not the substance of the law **per se**, but rather the procedure of its adoption. In this context, the contingency of future legislative action is no different than the threat of any other acts sought to be enjoined in the future, whether they be unfair labor practices, illegal business combinations, or acts of racial discrimination. The procedure or method of adoption is the critical consideration here, and that will not change until the General Assembly is reapportioned.

Lastly, it is not realistically accurate to say that if the injunction is vacated below as concerns the proposed state constitution, it will be time enough then for this Court to resolve the issue, should the General Assembly attempt to re-submit a new constitution, and challenge is made thereto. The vacating below of the decree in this respect leaves undisturbed the fact that a federal court has condemned the constitutional amendment procedure here involved, and that the legal principle implicit therein still stands, obviously to be followed by the Court below which retains jurisdiction (R. 201) all the while. The 1964 special session which

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[2] National Municipal League, Model State Constitution (6th edition 1963).

proposed the constitution enjoined below cost the State of Georgia a sum in excess of one million dollars. It is nothing short of absurdity to assume that the Governor or Legislature would undertake to devote the time and effort to another submission with such an ominous cloud hanging over their heads. Stated differently, vacating the injunction below on mootness grounds would be no less efficacious than continuing it in effect and declaring it nonreviewable. The unsoundness of appellees' position on this issue was very well illustrated by the amusing dilemma confronting them upon oral argument: On the one hand, it was declared that no objection would be made should the injunction be vacated; on the other, appellees were constrained to re-urge their protest should the 1965 General Assembly undertake to re-submit. The end result is that appellees want their relief, but wish to avoid review by this Court.

II

The District Court Was Without Power to Enjoin Submission of the Proposed Constitution

That Courts do not intervene to enjoin the legislative process while in progress is beyond dispute. **Mississippi v. Johnson,** 4 Wall 475, 500 (1866); **New Orleans Waterworks Co. v. New Orleans,** 164 U.S. 471, (1896); **McChord v. L. & N. Railroad Co.,** 183 U.S. 483, 495-6 (1902); **Prentis v. Atlantic Coast Line Co.,** 211 U. S. 210, 228 (1908); **State ex rel Cranmer v. Thorson,** 9 S. D. 148, 68 N. W. 202 (1896); **Drew v. Scranton,** 229 F. Supp. 308 (D. C. Pa. 1963), vacated on other grounds, **Scranton v. Drew,** —U. S.—, 33 L.

W. 3181 (1964), and see, **Johnson v. Genessee County, Michican,** 232 F. Supp. 563 (D. C. Mich. 1964). In only two instances have federal courts sought to delimit the authority of a state legislature pending reapportionment. See **Thigpen v. Myers,** —F. Supp.— (D. C. Wash.), decided October 26, 1964, modifying decree in 231 F. Supp. 938; and **Buckley v. Hoff,** 234 F. Supp. 191 (D. C. Vt. 1964), appeal pending, No. 624, 33 Law Week 3165. In the **Washington Case,** however, the order appears to have been suggested by the state itself, and in any event was issued following a succession of interminable delays by the state. In the **Buckley Case,** the order was simply rendered without discussion or citation of authority.

Viewed merely as one type of relief in a case of this nature, the obvious reply is that accepting the necessary premise of the Court below—that the document reflects malapportionment-caused biases (R. 142)—it also follows that the people are no less capable of resolving this political question than are judges. Nor is this a situation, as suggested by appellees, where a law void because of defects in its substantive content is sought to be made valid through popular referendum, cf. **Lucas v. The Forty-Fourth General Assembly,** 37 7U. S. 713 (1964), for here even the Court below conceded that had the constitution been submitted and ratified, it would have been immune from attack (R. 138), and the very issue at stake here is whether the mere fact of permitting the people to vote on a document in an election in which perfect equality is the rule, violates equal protection. Conceding the proposition advanced below, the scope of the equal protec-

tion clause would vary depending upon the stage at which it is asserted.

On the other hand, viewed as an abstract principle of constitutional law, it would follow that the constitutional initiative provisions in thirteen states[3] would be rendered void, for none of them undertake to require that the initiating body reflect the "one man, one vote" principle. Nor is it any answer, as asserted by appellees' Supplemental Memorandum (p. 4) that the initiative provision affords opportunity to opposing factions, for the existence of a political remedy is irrelevant except as a basis for temporary abstention. **Lucas v. The Forty-Fourth General Assembly,** supra.

The invocation of the relief granted by the district court is particularly incomprehensible here. The effect of prohibiting submission of the 1964 Constitution, adopted by a General Assembly in whose population-based senate 43% of the senators from the 9 urban districts represent 43% of the people, is that the 1945 Constitution remains in effect—a constitution submitted under the identical procedure by a much more malapportioned legislature in which the 9 largest senate districts having over 50% of the state's population had only 16% of the senators. What was done here was tantamount to declaring an existing apportionment statute valid and thereby reviving and falling back on an even more invidiously discriminatory one. The matter is placed in an even stronger light here because of

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[3] National Municipal League, Salient Issues of Constitutional Revision, p. 55 (1961), and see National Municipal League, Model State Constitution, p. 19, 104 (6th Ed. 1963); Graves, State Constitutional Revision, p. 25 et seq. (1960).

the conceded fact that the proposed constitution was much more favorable to urban areas than the existing one. When the district court below first issued its order, it is interesting to note that the City of Atlanta filed a "motion" as **amicus curiae,** seeking modification of the order in light of the City's concern for the provisions of the proposed constitution relaing to "rapid transit, home rule, public finance, and others . . ." (R. 176).

The effect of the relief granted below was not to vindicate the voting rights of **anyone;** to the contrary, the decree denies the voting rights of **all.** Equally objectionable, its tendency is to completely debilitate and further paralyze state governments pending reapportionment. Conceding the validity of what was done here ,where is the line to be drawn? How stands the Code of Georgia of 1933 and all statutes adopted since then? It is the high function of federal courts to preserve state government, not to destroy it, for as was stated almost 100 years ago,

> ". . . (B)ut it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of a National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states." **Texas v. White,** 7 Wall. 700, 725, 19 L. Ed. 227 (1869).

III

State Court Determination of the State Law Question

During oral argument, the question was asked as to why the state had not proceeded to institute appropriate action in state courts to secure a resolution of the question concerning the validity under the state constitution of the amending procedure in question.

To begin with, the state was already under an injunction based upon the district court's adjudication of this identical question, and appellants were precluded by considerations of prior jurisdiction, 28 USCA 2283, pendency of prior action, Ga. Code § 3-601, as well as res judicata. Aside from this, the effect of the district court's order was to deny to appellants an opportunity to do just this, had the Court below abstained as suggested by counsel for appellants.[4]

In any event, appellants hereby declare that should the decree be reversed, they will undertake to secure an authoritative determination in state court of this question before re-submission of a new constitution. However, appellants further state that in their opinion, the decision of the Supreme Court of Georgia in **Wheeler v. Board of Trustees of Fargo School District**, 200 Ga. 323, 37 S. E. 2d 322 (1946), is so clear and unambiguous as to preclude doubts or to require further interpretation. Assuming otherwise, however, in view of the concession by the Court below that the question was "doubtful" (R. 168), and particularly in view of the opinion of the Attorney General rendered

[4] Made during oral argument on June 24 (not reported).

May 28, 1964 (Brief on Merits, p. 23) to abstain was the very most that the Court below should have done. See **Louisiana Power & Light Co. v. Thibodaux,** 360 U. S. 25 (1959), for an analogous situation.

IV

Conclusion

This case, more than most, illustrates the unwisdom of a Court's undertaking to inject issues and grant relief neither desired or originally prayed for by the parties. The plaintiffs went before the district court below represented by thirteen of the most prominent lawyers in Georgia, drawn from a wide cross section of the state. It is a reflection upon these eminent counsel to say that their clients were so poorly represented that the Court below had to act **ex meru motu.** Today, no less than during the time of **Dred Scott's Case** (19 How. 323), sound judicial administration counsels against a court's going outside the record and assuming the role of a **censor morum.** The judgment below should be reversed.

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